Supreme Court, U.S.
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No.____

In The
Supreme Court of the United States

TORREY BAUER, THE HONORABLE DAVID CERTO, AND INDIANA RIGHT TO LIFE, *Petitioners*,

v.

RANDALL T. SHEPARD, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

Petition for a Writ of Certiorari

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Questions Presented

This Court in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) established that the First Amendment protects judicial campaign speech and subjects regulation of such speech to strict scrutiny. Indiana, like many other states, has adopted judicial speech regulations that ban judicial candidates from personally soliciting campaign contributions, restrict certain partisan activities, and limit their campaign statements. The Seventh Circuit below reaffirmed its recent decision in *Siefert v. Alexander*, 608 F.3d 974 (7th Cir. 2010), rejected the strict scrutiny standard employed in *White* and by the Sixth, Eighth, and Eleventh Circuits, upheld all of the judicial candidate speech bans, and advised judicial candidates to pre-approve their campaign speech with the State.

(1) Whether restrictions on judicial campaign speech are uniformly subject to strict scrutiny under the First and Fourteenth Amendments to the United States Constitution, which should be applied here;

(2) Whether the personal solicitation clause is unconstitutional under the First and Fourteenth Amendments to the United States Constitution;

(3) Whether the personal solicitation clause is unconstitutional under the First and Fourteenth Amendments to the United States Constitution, as applied to personal solicitations of family members and close friends;

(4) Whether the party leadership clause is unconstitutional under the First and Fourteenth Amendments to the United States Constitution;

(5) Whether the party leadership clause is unconstitutional under the First and Fourteenth Amendments to the United States Constitution, as applied to serving as a delegate at a political party state convention;

(6) Whether the party solicitation clause is unconstitutional under the First and Fourteenth Amendments to the United States Constitution;

(7) Whether the party solicitation clause is unconstitutional under the First and Fourteenth Amendments to the United States Constitution, as applied to encouraging individuals to become more politically involved by contributing for a political party;

(8) Whether the party advocacy clause is unconstitutional under the First and Fourteenth Amendments to the United States Constitution;

(9) Whether the party advocacy clause is unconstitutional under the First and Fourteenth Amendments to the United States Constitution, as applied to speaking at political club meetings on behalf of Republican judges and the Republican Party;

(10) Whether the commits clause is unconstitutional under the First and Fourteenth Amendments to the United States Constitution;

(11) Whether the commits clause is unconstitutional, under the First and Fourteenth Amendments to the United States Constitution, as applied to judicial candidates answering the Indiana Right to Life questionnaire;

(12) Whether vague or overbroad restrictions on judicial speech should be struck down as unconstitutional or should the chilled speaker be required to seek government pre-approval instead;

(13) Whether petitioners' challenge to the preliminarily enjoined but subsequently revised promises and commitments clauses are ripe;

(14) Whether the promises and commitments clauses are unconstitutional under the First and Fourteenth Amendments to the United States Constitution.

Parties to the Proceedings

The following individuals and entities are parties to the proceedings in the court below:

Torrey Bauer, Judge David Certo, and Indiana Right to Life, Inc., *Plaintiffs-Appellants*;

Randall T. Shepard, Stephen L. Williams, Christine Neck, John C. Trimble, Mark Lubbers, Michael Gavin, John Feighner, Anthony M. Zappia, Sally Franklin Zweig, Catherine A. Nestrick, Corinne R. Finnerty, Fred Austerman, R. Anthony Prather, *Defendants-Appellees*;

Corporate Disclosure Statement

Petitioners have no parent corporation and are not a publicly held corporation. Rule 29.6.

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Petition for a Writ of Certiorari

Petitioners Torrey Bauer, Judge Certo, and Indiana Right to Life, Inc. respectfully request a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Seventh Circuit in this case.

Opinions Below

The order of the court of appeals affirming the district court is at WL 3271960. App. 1a. The district court opinion is at 634 F. Supp. 2d 912. App. 29a.

Jurisdiction

The court of appeals upheld the district court's decision on August 20, 2010. App. 1a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitution, Statutes & Regulations Involved

U.S. Const. amend. I is in the Appendix at 117a.
Indiana Canon 2.10(B) is at 117a.
Indiana Canon 4.1(A)(1), (2), (4), (8) and (13) is at 117a.

Indiana Canon 5A(3)(d)(i) and (ii).

Statement of the Case

This case presents a constitutional challenge by Torrey Bauer, a 2008 judicial candidate who believes he will run again in a future judicial election; Judge David Certo, a sitting judge who anticipates running for reelection and a judicial candidate in Indiana's 2008 election; and Indiana Right to Life, Inc. ("INRTL"), a nonprofit organization who sends out questionnaires to judicial candidates for its voter guide.

Judge Certo challenges Indiana's personal solicita-

tion clause, party leadership clause, party solicitation clause, and party advocacy clause, all found in Indiana Canon 4.1(A). These clauses ban personal solicitation of campaign contributions and political party involvement, prohibiting judicial candidates from engaging in such protected speech. Judge Certo claims these restrictions are unconstitutional on their face and as applied to the in-person solicitations and partisan activities Judge Certo wishes to engage in.

In addition, Plaintiffs Bauer, Certo and Indiana Right to Life also challenge the commits clause, found in both Indiana Canon 2.10 and Canon 4.1(A)(13), because it imposes a substantial burden on judicial candidates' political speech,[1] chilling Mr. Bauer and Judge Certo from announcing their views on disputed legal and political issues by answering Indiana Right to Life's questionnaire. It is unconstitutional on its face and as applied to Indiana Right to Life's questionnaire.

Finally, Plaintiffs continue to challenge the constitutionality of the promises clause, Canon 5A(d)(3)(i), and the commitments clause, Canon 5A(d)(3)(ii). The clauses prohibit judicial candidates from "(i) mak[ing] pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office," (the promises clause), and from "(ii) mak[ing] statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court," (the commit-

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[1] The case below also involved a challenge to Indiana's recusal clause. Indiana Canon 2.11(A). Petitioners are not seeking review of the Seventh Circuit's adverse ruling. App. 27a.

ments clause). Judicial candidates, including Mr. Bauer and Judge Certo, responded to the questionnaire when the promises clause and the commits clause were in force. Their responses remain grounds for disciplinary proceedings unless enjoined.

I. The Facts

Indiana Right to Life ("INRTL") is a non-profit educational organization that, among other things, collects and publishes data regarding judicial candidates' political philosophy and stance on disputed legal and political issues. AC ¶ 15. It has done this by sending out judicial candidate questionnaires. AC ¶ 21.[2]

In 2004, INRTL brought a legal challenge to the original promises and commitments clauses, Canon 5A(3)(d)(i) and (ii), and the general recusal clause, Canon 3E(1), because they were causing judicial candidates to decline to answer INRTL's questionnaire. *See Indiana Right to Life v. Shepard*, 463 F. Supp. 2d 879 (N.D. Ind. 2006) ("*Shepard I*"). Indiana Canon 5A(3) stated, in relevant part, that "A candidate for judicial office: ... (d) shall not: (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; (ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court ...." The original promises and commitments clauses were

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[2] Plaintiffs' Amended Complaint for Declaratory and Injunctive Relief ("AC") was verified by Mr. Bauer, Judge Certo, and Mike Fichter, President of Indiana Right to Life, Inc.

interpreted in Preliminary Advisory Opinion #1-02 ("Advisory Opinion"), after this Court's decision in *White*, to reach "broad statements relating to the candidate's position on disputed social and legal issues," because they "incur[] the risk of violating the 'commitment' clause and/or the 'promises' clause." (Advisory Opinion, Doc. 19, attached as Ex. 1 at 4.) Ms. Babcock, as counsel to the Commission on Judicial Qualifications, also advised judicial candidates not to answer the 2004 INRTL Questionnaire, because doing so could violate these clauses. (Babcock Dep., Doc. 19, attached as Ex. 16 at 41:21-23.)

The district court granted summary judgment against the Commission as to the former promises and commitments clauses. (Judgment, Doc. 19, attached as Ex. 15.) However, on appeal, the Seventh Circuit determined that INRTL lacked standing to bring its suit because no clear evidence existed that a judicial candidate wanted to answer its Questionnaire. *Indiana Right to Life v. Shepard*, 507 F.3d 545, 549-550 (7th Cir. 2007).

In 2008, INRTL again solicited judicial candidates for responses to its identical 2008 Questionnaire. App. 123a. Judicial candidates who contacted the Commission about the propriety of answering this questionnaire were give identical answers:

> In response to your question about a[sic] judicial candidates answering surveys, a candidate may not make pledges, promises, or commitments with respect to cases, controversies, or issues likely to come before the court on which the candidate will serve if elected or appointed.

> However, a candidate is free to express his or her views on social and legal issues.

(Comm. Resp., Doc. 19, attached as Ex. 3.) Attached to each response was Advisory Opinion #1-02, the commentary to a revised commits clause that was ultimately adopted, App. 122a, and an Advisory Memorandum from the National Ad Hoc Advisory Committee on Judicial Campaign Oversight. The memo advised judicial candidates to avoid citing the canons in responding to questionnaires like INRTL and offered sample language as to how to answer questionnaires. (Ad Hoc Memo, Doc. 19, attached as Ex. 5.)

Because so many candidates selected "decline" for their answer, INRTL did not publish the substantive responses it did receive, fearing that doing so would expose judicial candidates to discipline, AC ¶ 29, and brought this action, along with Plaintiffs Bauer and Certo, against Defendants challenging the promises and commitments clauses. Mr. Bauer was a judicial candidate who risked potential discipline because he had already answered the questionnaire. AC ¶ 28. Judge Certo was also a judicial candidate but he had declined to answer the questionnaire because of the promises and commitments clauses. AC ¶ 32. Mr. Bauer lost his primary election in 2008, but Judge Certo was elected judge in the general election. Mr. Bauer expects he will run again in a future election. AC ¶ 28. Judge Certo will run to retain his judgeship in future elections. AC ¶ 32.

In addition, this case also included a challenge to Canon 5's personal solicitation clause, the party leadership clause, the party solicitation clause, and the party advocacy clause on behalf of Judge Certo. Judge

Certo wanted to personally solicit funds for his campaign from family members, former roommates and classmates—none of which would affect his ability to be impartial any more than he is already affected. AC ¶¶ 40, 41. But Canon 5C(2) (the "personal solicitation clause") prohibited judicial candidates from "personally solicit[ing] or accept[ing] campaign contributions or personally solicit[ing] publicly stated support," allowing them to instead form a committee for that purpose.

Judge Certo also desired to serve as a delegate to the Indiana State Republican Convention. AC ¶ 42, 43. He did not engage in these activities because Canon 5A(1) (the "party leadership clause") prohibited judicial candidates from "(a) act[ing] as a leader ... in a political organization."

Judge Certo also wanted to—but did not—encourage participation in the political process by encouraging individuals to make contributions to the Republican Party. AC ¶¶ 40, 41. But Canon 5A(1) (the "party solicitation clause") prohibited judicial candidates from "solicit[ing] funds for, pay[ing] an assessment, slating fee or other mandatory political payment to, or mak[ing] a contribution to, a political organization or candidate."

Last, Judge Certo wanted to speak to students on behalf of the Republican Party, including at such events as the Eastern Indiana Model Legislature, a program designed to teach high-school students about Indiana's legislature, with which he has participated in the past. AC ¶¶ 42, 43. And he wanted to speak at political club meetings on behalf of Republican judges and the Republican Party. AC ¶¶ 42, 43. But Canon 5A(1)(c) (the "party advocacy clause") prohibited

judicial candidates from "mak[ing] speeches on behalf of a political organization."

Judge Certo challenges the personal solicitation clause, the party leadership clause, the party solicitation clause, and the party advocacy clause on their face. He also raises as applied challenges to them. He challenges the personal solicitation clause as applied to personal solicitations of family members and close friends. AC ¶¶ 90, 92. (Certo Decl., Doc. 50-2, ¶ 4.) He challenges the party leadership clause as applied to serving as a delegate at a political party state convention. AC ¶ 105. He challenges the party solicitation clause as applied to encouraging individuals to become more politically involved by contributing to a political party. AC ¶¶ 90, 92. (Certo Decl., Doc. 50-2, ¶5.) And he challenges the party advocacy clause as applied to encouraging students to become more politically involved in the Republican Party and to speaking at political club meetings on behalf of Republican judges and the Republican Party. AC ¶ 105 (Certo Decl., Doc. 50-2, ¶3.)

Petitioners were given an preliminary injunction against the promises and commitments clauses on May 6, 2008. Relying on that injunction, INRTL recirculated its questionnaire, notifying judicial candidates of the injunction and published the results. AC ¶ 38.

Effective January 1, 2009, the Indiana Supreme Court amended the Indiana Code of Judicial Code. In light of this, the District Court directed Plaintiffs to amend their Complaint in relation to those new canons. (R. 64.) Because the revised canons were substantially identical to the prior canons, Plaintiffs incorporated the new canons into their constitutional

challenge and retained their challenge to the promises and commitments clauses.

Canons 2.10(B) and 4.1(A)(13) (the new "commits clause") prohibit judges and judicial candidates from, "in connection with cases, controversies, or issues that are likely to come before the court, mak[ing] pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office." The Commentary to these clauses state that "[15] The making of a pledge, promise, or commitment is not dependent upon, or limited to, the use of any specific words or phrases; instead, the totality of the statement must be examined to determine if a reasonable person would believe that the candidate for judicial office has specifically undertaken to reach a particular result." App. 122a. Because of these canons, Judge Certo and Torrey Bauer will not answer any subsequent INRTL questionnaires and INRTL will not publish any responses it receives. AC ¶¶ 30, 32, 39.

The new Canon 4.1(A) retains substantively identical language to the original Canon 5 and prohibits judicial candidates from "(8) personally solicit[ing] or accept[ing] campaign contributions other than through a campaign committee" (the personal solicitation clause), "(1) act[ing] as a leader in or hold an office in a political organization" (the party leadership clause), "(4) solicit[ing] funds for, pay[ing] an assessment to, or mak[ing] a contribution to a political organization or a candidate for public office" (the party solicitation clause), and "(2) mak[ing] speeches on behalf of a political organization" (the party advocacy clause). Judge Certo continues to be prohibited from the personal solicitation, the party solicitation, the

party leadership, and the party advocacy he desired to engage in under the old Code. AC ¶¶ 41, 43.

Petitioners suffer and will continue to suffer irreparable harm with no adequate remedy at law. AC ¶ 45.

II. The History of the Litigation.

In September 2004, Indiana Right to Life, Inc., Arline Sprau, and Mary P. Hall filed their Verified Complaint. *Indiana Right to Life v. Shepard,* 463 F. Supp. 2d 879, 881 (N.D. Ind. 2006). On November 14, 2006, the district court granted summary judgment to the Plaintiffs and declared the promises and commitments clauses unconstitutional. *Id.* On appeal, the Seventh Circuit ruled that plaintiffs lacked standing and dismissed the case. *Indiana Right to Life v. Shepard,* 507 F.3d 545 (7th Cir. 2007).

On April 18, 2008, Mr. Bauer, Judge Certo, and Indiana Right to Life filed their Complaint against Canons 5A(3)(d)(i) and (ii) (the commitments clause) and 3E(1) (the general recusal clause). (Doc. 1.) Concurrently, they sought to preliminary enjoin the promises and commitments clauses, which was granted on May 6, 2008. (Doc. 3, 23.) An Amended Complaint was filed on June 5, 2008, adding additional challenges to Canons 5A(1)(e) and 5C(2)—the personal solicitation clause and the party solicitation clause—and 5A(1)(a) and (c)—the party leadership clause and the party advocacy clause—on behalf of Judge Certo. (Doc. 25.)

Mr. Bauer, Judge Certo, and Indiana Right to Life sought summary judgment against all of the challenged canons on July 28, 2008. (Doc. 31.) The Court continued briefing for the motion on September 25,

2008, to allow for sixty days of discovery. (Doc. 37.) Because Judge Certo wished to engage in protected speech during the litigation, he sought a preliminary injunction against the personal solicitation clause, the party leadership clause, the party solicitation clause, and the party advocacy clause on October 1, 2008. (Doc. 39.) Both the summary judgment and preliminary injunction requests were denied as moot on March 23, 2009, in light of revisions to Indiana's Code of Judicial Conduct. (Doc. 64.) At the District Court's direction, Mr. Bauer, Judge Certo, and Indiana Right to Life filed a Second Amended Complaint to account for the changes to the Code, (Doc. 67), and refiled their Motion for Summary Judgment to reflect those changes on May 1, 2009. (Doc. 70.) They retained their challenge against the former promises and commitments clauses to ensure permanent protection for those who acted under the preliminary injunction previously granted by the District Court. The Commission also filed a Motion for Summary Judgment on May 1, 2009. (Doc. 72.) The District Court ruled on the briefs, dismissing the former promises and commitments clauses claim as moot and uphold all provisions as constitutional under the First Amendment. (Doc. 83.)

Petitioners appealed the ruling on August 6, 2009. On August 20, 2010, the Seventh Circuit found Plaintiffs' claims against the former promises and commitments clauses to be unripe rather than moot, but otherwise affirmed the District Court decision, employing *Siefert*'s holding and rationale to uphold the canons as constitutional.

Reasons for Granting the Petition

This case is an extension and expansion of the regime established by the Seventh Circuit in *Siefert v. Alexander*, 608 F.3d 974 (7th Cir. 2010) (petition for certiorari filed September 22, 2010), by approving the prohibition of ordinary, standard, and indeed, essential, campaign practices for judicial candidates, and by requiring judicial candidates to seek prior approval from the government before announcing their views on disputed legal and political issues. The Seventh Circuit reached this result by refusing to apply strict scrutiny to numerous restrictions on judicial candidate campaign speech and thereby upholding them as constitutional. This regime conflicts with this Court's holding in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002)(*White I*), and the Seventh Circuit has now extended that regime here to run afoul of *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) ("*WRTL II*"), and *Citizens United v. FEC*, 130 S.Ct. 876 (2010).

Not only is this regime—established in *Siefert*, expanded in *Bauer*—contrary to the Constitution and this Court's First Amendment jurisprudence, but it also creates conflicts with those circuits that have applied strict scrutiny to strike restrictions on judicial candidate speech like those at issue here. This Court should grant a writ of certiorari to both Seventh Circuit cases and decide them on the merits.

I. This Case Involves The Important Question of Law of Whether Restrictions on Judicial Candidate Speech Are Subject to Strict Scrutiny, Which Should be Applied Here.

In *White,* 536 U.S. at 765, this Court applied strict scrutiny to Minnesota's announce clause to pronounce it unconstitutional. *Id.* at 774. This clause, which prohibited judicial candidates from stating their views on disputed legal and political issues, was not narrowly tailored to serve the State's compelling interest in impartiality. *Id.* at 776.

In reviewing Minnesota's announce clause, the *White I* court affirmatively cited *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224 (7th Cir. 1993), which had applied strict scrutiny to strike Illinois' announce clause. The Seventh Circuit acknowledged a conflict with the Third Circuit in *Stretton v. Pennsylvania,* 944 F.2d 137 (3d Cir. 1991), which had upheld Pennsylvania's announce clause, while applying strict scrutiny to it. *Id.* at 141, 146. But both cases applied strict scrutiny to the judicial campaign speech restrictions before them.

As more thoroughly demonstrated in the *Siefert* companion petition, circuit courts across the country have followed *White I*'s lead, applying strict scrutiny to judicial campaign speech restrictions like those challenged here and in *Siefert. See Wersal v. Sexton,* WL 2945171 (8th Cir. 2010); *Carey v. Wolnitzek,* WL 2771866 (6th Cir. 2010); *Republican Party of Minnesota v. White,* 416 F.3d 738 (8th Cir. 2005) ("*White II*"); *Weaver v. Bonner,* 309 F.3d 1312 (11th Cir. 2002). (Siefert Pet. Cert., Part I.) The *Bauer* decision repre-

sents a continuation of the Seventh Circuit's refusal to adhere to the principles articulated in *White I* and followed by other circuits and an expansion of the resulting regime to threaten the very speech this Court sought to protect in *White I*.

II. The Seventh Circuit Reiterates Its Unconstitutional Regime In Conflict With Decisions of This Court.

A. *Buckley*'s Lesser Scrutiny Is The Wrong Standard.

In analyzing the personal solicitation clause, the *Bauer* court adopted wholesale the rationale articulated in its recent *Siefert* case: that under *Buckley v. Valeo*'s lesser scrutiny, the personal solicitation clause was sufficiently tailored to support the state's interest in impartiality, rendering it constitutional. App. 9a. But as the *Siefert* petition shows, this standard was for contribution limits, not direct, political speech. (Siefert Pet., Part II.A.) Applying anything less than strict scrutiny to judicial campaign speech continues to conflict with this Court's jurisprudence and the decisions of other circuits.

B. A Balancing Test Is The Wrong Standard.

In upholding the party leadership clause, the party solicitation clause, and the party advocacy clause, the court below extended its endorsement clause balancing analysis. App. 12a. For the reasons stated in the *Siefert* petition for writ of certiorari, the use of any standard but strict scrutiny conflicts with decisions of this Court and those circuits that have followed it. (Siefert Pet., Part I.B.) And indeed, the *Bauer* court acknowledges

the conflict its balancing test creates but ultimately "remain[s] unpersuaded and [will] stick with *Siefert*'s analysis, which differentiates what judges can do in their own campaigns (the subject of *White I*) from how judges can participate in other persons' campaigns (the subject of *Letter Carriers* and similar decisions)." App. 17a.

Because the wrong standards have been firmly established in the Seventh Circuit, this Court's review is warranted.

III. The Decision Below Is In Conflict With Other Circuit Decisions On The Same Important Matter.

A. The Personal Solicitation Clause Is Unconstitutional.

Judge Certo would like to personally solicit campaign funds from family and friends. But Indiana's personal solicitation clause prohibits judicial candidates from "personally solicit[ing] or accept[ing] campaign contributions other than through a campaign committee." Canon 4.1(A)(8). Following *Siefert*, the court below applied *Buckley* to find it was sufficiently tailored to serve an important interest. App. 9a-10a.

As discussed in the *Siefert* certiorari petition, the Seventh Circuit's decision to uphold the personal solicitation clause conflicts with that of the Sixth, Eighth, and Eleventh. (*See* Siefert Pet. Cert. at Part II.A.) In fact, the *Bauer* court recognized it was reinforcing this conflict but reasoned that a circuit split already existed as to the solicitation clause's constitutionality and so saw little reason to be deviate from *Siefert*. App. 11a. It derived this prior circuit split from

Stretton v. Disciplinary Bd. of Supreme Ct. of Penn., 944 F.2d 137 (3d Cir. 1991). In *Stretton*, the Third Circuit reviewed Pennsylvania's solicitation clause under strict scrutiny to conclude that the solicitation clause was constitutional because it served a compelling interest in minimizing coercion. *Id.* at 146.

Significantly, the *Stretton* decision preceded this Court's ruling in *White I*.[3] So the Sixth, Eighth, and Eleventh Circuits—along with the Seventh—had the benefit of the *White I* decision, which recognized impartiality, not coercion, as a compelling interest. *White II*, 416 F.3d at 753-54; *Wersal*, WL 2945171 at *15; *Weaver*, 309 F.3d at 1319; *Carey*, WL 2771866 at *13. The Seventh Circuit's willingness to adopt *Stretton*'s analysis—though making every effort to make it appear that impartiality, not coercion, was the interest served—creates a post-*White I* circuit split that undermines the otherwise national uniformity established in this area of law. This conflict warrants Petitioners' writ to be granted.

B. The Party Leadership Clause Is Unconstitutional.

Judge Certo wants to be able to serve as one of the hundreds of delegates at the Indiana GOP Convention who nominate Republican state-wide candidates for election. However, Canon 4.1(A)(1) (the "party leadership clause") prohibits judicial candidates from "act[ing] as a leader in or hold an office in a political

[3] Indeed, in addition to upholding Pennsylvania's solicitation clause, *Stretton* upheld the state's announce clause, casting serious doubt on the validity of its analysis in light of *White I*. *See Stretton*, 944 F.2d at 145.

organization."

Having established a balancing test to review the endorsement clause in *Siefert*, the *Bauer* court extends the *Siefert* analysis to the party leadership clause, concluding that it is a constitutional exercise of the State's "desire to prevent judges from using the prestige of office for other ends." App.14a. According to the *Bauer* court, recusal for partisan involvement in party politics would be substantial, thus it is no solution to protecting this interest. App. 15a-16a.

This rationale conflicts with the fundamental premise of the Eighth Circuit's analysis in *Wersal* and *White II*. That court acknowledged that "'the underlying rationale for the party affiliation ban—that *associating with a particular group* will destroy a judge's impartiality—differs only in form from that which purportedly supports the announce clause—that *expressing one's self on particular issues* will destroy a judge's impartiality.'" *Wersal*, WL 2945171 at *9 (*quoting White II*, 416 F.3d at 754 (emphasis in original)). And "any credible claim of bias would have to flow from something more than the bare fact that the judge had associated with that political party." *Id.*

The same analysis is true of the party leadership clause. Involvement with the Republican Party is yet another means of announcing views—both as the platform of the Party as well as to asserting views within the Party. While serving concurrently as a judge and as a state party chairman of a political organization might be trigger some impartiality concerns, the party leadership clause is not restricted to holding a political party office. Instead, it precludes leadership in any capacity. By virtue of being Republi-

can judge, Judge Certo views himself as a leader in the Republican Party. His involvement in Republican Party as a delegate would allow him to announce his views within the party as to who should receive party nominations and would not prevent him from being impartial should a case involving the Republican Party or its candidates come before him as judge. And in those rare instances where his impartiality might be reasonably questioned, "recusal is the least restrictive means of accomplishing the state's interest in impartiality articulated as a lack of bias for or against parties to the case." *White II*, 416 F.3d at 754. The party leadership clause is overbroad and not narrowly tailored.

Because the *Bauer* court's analysis conflicts with this Court's precedent and with *White II*, this Court should grant review.

C. The Party Solicitation Clause Is Unconstitutional.

Judge Certo wants to be able to encourage individuals to financially support the Republican Party. However, the party solicitation clause prohibits judicial candidates from "solicit[ing] funds for, pay[ing] an assessment to, or mak[ing] a contribution to a political organization or a candidate for public office." Canon 4.1(A)(4).

Advocating financial support for a political party is a way to announce views both in line with and in support of the party. A judicial candidate might also indirectly support his own campaign, both through supporting the party on which he depends and through any financial support the party might direct his way

during his campaign. And encouraging individuals to financially support the Republican Party, as Judge Certo wishes to do, would not prevent him from being impartial should a case involving the Republican Party or its candidates come before him as judge. In those rare instances where his impartiality might be reasonably questioned, recusal continues to serve as the least restrict means of ensuring impartiality in the courts. *White II,* 416 F.3d at 754. The party solicitation clause fails strict scrutiny.

Because of the *Bauer* court's analysis conflicts with decisions of the Court and with *White II*, this Court should grant a writ of certiorari.

D. The Party Advocacy Clause Is Unconstitutional.

Judge Certo wants to speak at political club meetings on behalf of Republican judges and the Republican Party and speak to students on behalf of the Republican Party. A particular passion of his is participating in the Eastern Indiana Model Legislature, a program designed to teach high-school students about Indiana's legislature and its politics, a program with which he has participated in the past. AC ¶¶ 42, 43. He would like to continue participating in the Model Legislature on behalf of the Republican Party, but he will not because Canon 4.1(A)(2)(c) (the "party advocacy clause") prohibits judicial candidates "mak[ing] speeches on behalf of a political organization."

As it did with the other political party-related clauses, the *Bauer* court extended *Siefert*'s balancing test to conclude that the party advocacy clause is a

constitutional exercise of the State's "desire to prevent judges from using the prestige of office for other ends." App. 14a. A narrower solution of recusal was found to be inadequate, because recusal motions would be substantial due to party involvement. App. 15a-16a.

This conflicts with *Wersal* and *White II*, which recognize that associating with a particular group is tantamount to announcing views. *Wersal*, WL 2945171 at *9 (*quoting White II*, 416 F.3d at 754 (emphasis in original)). Any claim of bias in such contexts must derive from more than "the bare fact that the judge had associated with that political party." *Id.*

The same analysis is true of the party advocacy clause. A judicial candidate's agreement with the policies of her political party by speaking out for that party is another form of announcing her views, provided she does not pledge or promise certain results in a particular case or class of cases. *White I*, 536 U.S. at 770. Judge Certo is no more biased for the Republican Party by speaking on behalf of Republican judges and the Republican Party at political club meetings or with students than if he only stated his political affiliation with the party (which he is permitted to do). *See* Canon 4.1(C)(1) ("A judge in an office filled by partisan election, a judicial candidate seeking that office, and a judicial officer serving for a judge in office filled by partisan election may at any time: ... identify himself or herself as a member of a political party ...."). In the event his impartiality would be reasonably questioned, "recusal is the least restrictive means of accomplishing the state's interest in impartiality articulated as a lack of bias for or against parties to the case." *White II*, 416 F.3d at 754. The party advocacy clause is not narrowly

tailored to serve a compelling interest.

Because of the *Bauer* court's analysis conflicts with decisions of the Court and with *Wersal* and *White II*, this Court should grant a writ of certiorari.

E. The Commits Clause Is Unconstitutional.

Mr. Bauer, Judge Certo, and other judicial candidates like them, would like to announce their views by answering INRTL's questionnaire without fear of discipline. The new commits clause,however, prohibits judges and judicial candidates from, "in connection with cases, controversies, or issues that are likely to come before the court, mak[ing] pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office." Canons 2.10, 4.1(A)(13). Comment 15 to Canon 4.1(A)(13) explains the scope of the rule, stating that "[t]he making of a pledge, promise, or commitment is not dependent upon, or limited to, the use of any specific words or phrases; instead, the totality of the statement must be examined to determine if a reasonable person would believe that the candidate for judicial office has specifically undertaken to reach a particular result." App 122a. The Seventh Circuit's ruling to uphold the commits clause is in conflict with decisions of this Court, the Sixth Circuit's decision in *Carey*, the Seventh Circuit's decision in *Buckley* and overlooks Petitioners' as-applied challenge.

1. The Commits Clause Is Overbroad.

In reviewing the commits clause, the *Bauer* court focused on Petitioners' overbreadth arguments. The court denied its application to INRTL's questionnaire—though the Commission's continued defense of the clause for six years of litigation might suggest other-

wise—and suggested that, in as much as the clause might overreach, such overbreadth can be rectified through subsequent exceptions from the Commission and the Indiana Supreme Court. App. 24a.

This conflicts with the Sixth Circuit's recent analysis in *Carey*. The *Carey* court reviewed Kentucky's commits clause, which prohibited judicial candidates from "'intentionally or recklessly mak[ing] a statement that a reasonable person would perceive as committing a judge or candidate to rule a certain way in a case, controversy, or issue that is likely to come before the court.'" *Carey v. Wolnitzek*, Nos. 08-6468, 08-6538, WL 2771866 (6th Cir. July 13, 2010) (*quoting* Kentucky Judicial Canon 5B(1)(c)). Despite being narrower than Indiana's commits clause—which has no scienter component—the *Carey* court expressed serious concerns about the scope of the commits clause before it. If the clause has only restricted itself to "judicial commitments with respects to cases and controversies," the court would have been satisfied as to its constitutionality. WL 2771866 at *15. But it immediately recognized that the inclusion of "issues likely to come before the court" within its scope raised some serious ambiguities and had the potential to render it unconstitutional unless Kentucky could offer a sufficiently narrow construction to keep it outside the purview of *White I*. *Carey*, WL 2771866 at *16-17. While it did not enjoin the rule, it remanded consideration of the clause to the district court for further examination. *Id.* at *17. Lacking a narrower construction, the clause would fail constitutionally. *Id.* at *17.

Rather than rectify the fatal First Amendment flaws it recognized in Indiana's commits clause, the *Bauer* court dismissed those concerns, satisfied that

the State can remedy them through advisory opinions and disciplinary proceedings. *See infra* Part IV. This result places the Seventh Circuit at odds with the Sixth Circuit.

Furthermore, this analysis conflicts with the Seventh Circuit's prior decision in *Buckley v. Illinois Judicial Inquiry Board*, 977 F.2d 224 (7th Cir. 1993), where the court struck down Illinois' announce clause as an overinclusive restriction on constitutionally-protected speech. *Id.* at 229. Of greatest concern to the *Buckley* court was the breadth of proscribed speech under the announce clause:

> The "announce" clause is not limited to declarations as to how the candidate intends to rule in particular cases or classes of case ... it gags the judicial candidate. He can say nothing in public about his judicial philosophy; he cannot, for example, pledge himself to be a strict constructionist, or for that matter a legal realist. He cannot promise a better shake for indigent litigants or harried employers. He cannot criticize *Roe v. Wade, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705.* He cannot express his views about substantive due process, economic rights, search and seizure, the war on drugs, the use of excessive force by police, the conditions of the prisons, or products liability—or for that matter about laissez-faire economics, race relations, the civil war in Yugoslavia, or the proper direction of health-care reform. Cf. Patrick M. McFadden, *Electing Justice: The Law and Ethics of Judicial Election Campaigns* 86-87 (1990). All these are disputed legal or political issues.

Id. at 228.

Because of the *Bauer* court's analysis conflicts with decisions of the Court and with *Carey* and *Buckley*, this Court should grant review.

2. The Commits Clause Is Unconstitutional As Applied To INRTL's Questionnaire.

After this Court's decision in *White* and prior to this litigation,, the Commission formally stated in Preliminary Advisory Opinion #1-02 that while "the Commission is compelled to acknowledge that candidates are permitted under the first amendment to state their *general* views about disputed social and legal issues," when

> a judicial candidate makes more specific campaign statements relating to issues which maybe come before the court beyond, for example, the somewhat amorphous 'tough on crime' statement, or broad statements relating to the candidate's position on disputed social and legal issues the candidate incurs the risk of violating the 'commitment' clause and/or the 'promises' clause.

(Advisory Op. #1-02, Doc. 19, at Ex. 1, pp. 2-3.) (emphasis in original). Throughout this litigation, the Commission has asserted that the questionnaire either falls under the purview of the commits clause or, at least, believes it is possible that it might—it hasn't decided yet. *See, e.g.*, Admission Responses, at App 133a ("[the Commission] has not made a decision as to whether responding to the Questionnaire would constitute a promise or a pledge. Further, parts of the Questionnaire ask questions that may elicit answers which suggest the judicial candidate's predispositions on

issues, which in turn, may constitute pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office."); App. 132a ([the Commission] has not made a decision as to whether responding to the Questionnaire would constitute a commitment. Further, parts of the Questionnaire ask questions that may elicit answers which suggest the judicial candidate's predispositions on issues, which in turn, may commit or appear to commit the judge/judicial candidate to rule in a particular way if those issues are later presented to the judge.") That it does or even could apply to the questionnaire renders the commits clause unconstitutional as-applied.

The questionnaire includes the following type statements, to which the response can be "Agree," "Disagree," "Undecided," "Decline," "Refuse to Answer":

> I believe that the unborn child is biologically human and alive and that the right to life of human beings should be respected at every stage of their biological development.
>
> ...
>
> I believe that abortion should be permitted only to prevent the death of the mother.
>
> ...
>
> I believe that *Roe v. Wade* was wrongly decided.
>
> ...
>
> I do not believe that a person should be able to sue another because he or she was born alive with a disability rather than aborted.

App 124a-129a. Agreeing or disagreeing with any of these statements does not amount to anything more than an announcement of views on disputed legal and political issues. They do not ask the candidate to

pledge or promise certain results in a particular case or class of cases, as is questioned in *White I*. 536 U.S. at 770. Instead, they solely seek the viewpoint of the candidate on disputed legal issues. In short, they fail directly within the scope of protected speech in *White I*.

Indeed, the *Bauer* court agreed that the questionnaire only asks candidates to announce their views:

> None of the nine questions calls for a "commitment" or "promise" on any issue. A judge who answers yes to the first proposition ("I believe that the unborn child is biologically human and alive and that the right to life of human beings should be respected at every stage of their biological development") has not committed to defying *Roe v. Wade* and its sequels. The proposition concerns morals, not conduct in office. Statements of views on moral and legal subjects do not imply that the speaker will act in accord with his preferences rather than the law. ... *White I* holds that judges and judicial candidates are entitled to announce their views on legal and political subjects that will come before them as judges. 536 U.S. at 788. That's all Indiana Right to Life's questionnaire asks them to do.

App 18a-19a.

This conclusion not only places the questionnaire squarely under the protection of *White I*, but it also should have dictated an unconstitutional ruling, as applied to the INRTL questionnaire. However, it did not.

Because the commits clause reaches announcing views, the Seventh Circuit's failure to find the commits

clause unconstitutional as applied to the questionnaire conflicts with *White I* and creates both an inter-circuit and an intra-circuit split. A writ of certiorari should be granted.

IV. The Seventh Circuit Expands Its Regime To Advocate Prior Restraint Of Judicial Campaign Speech In Conflict With This Court.

In reviewing the judicial canons at issue, the Seventh Circuit acknowledges the vagueness and overbreadth of three of the canons, but rather than strike the clauses as unconstitutional, the court directs judicial candidates to solve her problem by seeking government pre-approval of her speech – a process fundamentally abhorrent to the Constitution.

A. The Seventh Circuit Acknowledges Facial Deficiencies.

In analyzing the personal solicitation clause, the party advocacy clause, and the commits clause, the Seventh Circuit recognized that the scope of the clauses were facial infirm, but rather than strike the clauses, it advises judicial candidates to seek advice from the Commission before speaking.

1. The Personal Solicitation Clause Is Overbroad.

Judge Certo asked the Seventh Circuit to allow him to personally solicit campaign funds from his family and from college friends. The personal solicitation clause prohibits judicial candidates from all "personally solicit[ing] or accept[ing] campaign contributions other than through a campaign committee." Canon 4.1(A)(8). Asserting that it has no reason to believe the state will act unreasonably in providing exceptions to the personal solicitation clause, the Seventh Circuit admonishes Judge Certo to "follow

Indiana's procedures for obtaining advice with respect to contributions from family members." App. 10a.

2. The Party Advocacy Clause Is Vague.

Judge Certo also asked the court to allow him to speak out in support of the Republican Party at political club events and to students. But the party advocacy clause prohibits judicial candidates from "mak[ing] speeches on behalf of a political organization." Canon 4.1(A)(2). The Seventh Circuit admits that the party advocacy clause is unclear as to its scope, but rather than find it unconstitutionally vague, it again admonishes Judge Certo: "Indiana provides means of clarification. Judge Certo should use them." App. 14a.

3. The Commits Clause Is Vague.

Finally, Mr. Bauer and Judge Certo wanted to announce their views by answering INRTL's questionnaire. But the commits clause prohibits judges and judicial candidates from, "in connection with cases, controversies, or issues that are likely to come before the court, mak[ing] pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office." Ind. Canons 2.10, 4.1(A)(13). The Commentary to Canon 4.1(A)(13) states that "[15] The making of a pledge, promise, or commitment is not dependent upon, or limited to, the use of any specific words or phrases; instead, the totality of the statement must be examined to determine if a reasonable person would believe that the candidate for judicial office has specifically undertaken to reach a particular result." App. 94a.

The Seventh Circuit recognizes that the commits clause has an uncertain scope that may, in fact, proscribe announced views in contravention to *White I*. App. 23a-24a. But rather than declare the commits

clause unconstitutional, the court required Mr. Bauer and Judge Certo "to wait and see," App. 24a, since the Commission can issue advisory opinions or bring proceedings against judges that afford the state judiciary the opportunity to "make the rule more concrete." App. 24a.

B. Rather Than Strike the Speech Restrictions, The Seventh Circuit Imposes a Prior Restraint on Judicial Candidates.

In each instance—with the personal solicitation clause, the party advocacy clause, and the commits clause—the Seventh Circuit is satisfied that the Commission can rectify Petitioners' First Amendment harms. That judicial candidates should contact the Commission to either clarify a vague law or to secure exceptions to a clearly stated law is precisely the type of prior restraint abhorrent to the First Amendment.

In *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007), this Court reaffirmed its longstanding view that "'[t]he freedom of speech ... guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.'" *WRTL II*, 551 U.S. at 469 (*quoting First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978)). The Court refused to establish a test that turned on the intent and effect of the speaker, reasoning that an intent test would "blanket[] with uncertainty whatever may be said," and "offer[] no security for free discussion." *Id.* at 468 (*quoting Buckley*, 424 U.S. at 43). Likewise, an effect test would "'put[] the speaker ... wholly at the mercy of the varied understanding of his hearers.'" *WRTL II*, 551 U.S. at 468 (*quoting Buckley*, 424 U.S. at 43).

Indeed, this Court in *Citizens United v. FEC*, 130 S.Ct. 876 (2010), expressly disavowed such prior restraint: "The Government may not render a ban on political speech constitutional by carving out a limited exemption through an amorphous regulatory interpretation." *Id.* at 889. In *Citizens United*, the Court dismissed the FEC's efforts to offer a limiting interpretation of BCRA's corporate expenditure ban as unavailing. It found the ban to be unconstitutional because "[p]rolix laws chill speech for the same reason that vague laws chill speech: People 'of common intelligence must necessarily guess at [the law's] meaning and differ as to its application.'" *Id.* at 889 (*quoting Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). If such laws were allowed, the effect would be to vitiate pre-enforcement challenges and require speakers to either violate the law at the risk of an uncertain outcome, or remain unconstitutionally chilled.

Proscribing pre-enforcement challenges is precisely what the Seventh Circuit has done. The Seventh Circuit's approach encapsulates what the *WRTL II* and *Citizens United* decisions proscribed: a prior restraint in the form of required seeking of Commission advisory opinions, or a continued chill because of fear of subsequent punishment through disciplinary proceedings. Neither is a constitutional solution to an otherwise infirm speech restriction.

Crucially, the Seventh Circuit failed to acknowledge that judicial candidates *had already sought* advise from the Commission with regarding the INRTL questionnaire. The only assistance the Commission provided to judicial candidates in 2008 was to provide a near verbatim recounting of the relevant canon that

the court acknowledges is vague, a copy of Advisory Opinion #1-02—the vagueness of which formed the basis for the 2006 ruling striking the promises and commitments clauses, *Indiana Right to Life v. Shepard*, 469 F. Supp. 2d 879 (N.D. Ind. 2006)—and the equally vague commentary to the commits clause that premises a violation on what a reasonable person would perceive. App. 122a. Furthermore, during this litigation, the Commission has claimed that "parts of the Questionnaire ask questions that may elicit answers which suggest the judicial candidate's predispositions on issues, which in turn, may constitute pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office," *see, e.g.*, Admission Responses, at App 133a, and "parts of the Questionnaire ask questions that may elicit answers which suggest the judicial candidate's predispositions on issues, which in turn, may commit or appear to commit the judge/judicial candidate to rule in a particular way if those issues are later presented to the judge." *Id.* at App 132a. The only alternative, then, is for a candidate to risk both discipline and his good name to facilitate ascertaining the scope of the commits clause. Such a remedy is contrary to *Buckley*, *WRTL* and *Citizens United*.

Because the Seventh Circuit adopts a prior restraint approach to restrictions of judicial campaign speech that is in conflict with this Court's jurisprudence, this petition should be granted.

V. The Seventh Circuit Erred In Refusing To Review The Constitutionality Of The Promises and Commitments Clauses and Strike It Down.

A. The Promises and Commitments Clauses Challenge Is Ripe.

On May 6, 2008, the district court issued a preliminary injunction against the promises and commitments clauses, which prohibits judicial candidates from "(i) mak[ing] pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; (ii) mak[ing] statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court ...." Indiana Canon 5A(3)(d). In an effort to protect judicial candidates—including Judge Certo—who answered the questionnaire in light of the preliminary injunction, and Mr. Bauer, who had answered the questionnaire before the issuance of the preliminary injunction, Petitioners have sought to have the promises and commitments clauses permanently enjoined. AC ¶¶ 38, 46-59.

The Seventh Circuit found Petitioners' challenge to the clauses unripe. According to the Court, there are "too many unlikely steps [needed] to justify constitutional adjudication." App. 7a. A candidate that responded to the questionnaire would need to be elected to the judiciary, be prosecuted by the Commission, and have the Indiana Supreme Court impose discipline. App 7a. And "[i]f the Commission ever hales ... anyone ... before the Supreme Court of Indiana on a charge of violating the former Canon 5A(3)(d), a defense based on the first amendment can be raised and adjudicated in the regular course." App. 8a. In other words, no

injury could be claimed unless the promises and commitments clauses are positively enforced.

Yet again, the Seventh Circuit subverts the pre-enforcement jurisprudence of this Court and undermines the chill component of constitutionally infirm laws. *See supra* Part II.B. The district court, in refusing to issue a permanent injunction against the promises and commitments clauses, now allows both Mr. Bauer and Judge Certo to be disciplined for violating the clauses because they answered the questionnaire. The threat of enforcement against those candidates is as real now as it was when the preliminary injunction was issued.

B. The Promises and Commitments Clauses Are Unconstitutional.

Mr. Bauer and Judge Certo want to answer INRTL's questionnaire without threat of prosecution. Mr. Bauer responded to the 2008 questionnaire erroneously believing that the promises and commitments clauses had already been enjoined. AC ¶ 28. Judge Certo responded to the questionnaire under the protection of the lower court's preliminary injunction. AC ¶ 38.

The promises clause prohibits judicial candidates from "(i) mak[ing] pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office." This clause is facially infirm. It is overbroad because it reaches promises the State has no interest in restricting, such as a pledge "to be a strict constructionist, or for that matter a legal realist," or a "promise a better shake for indigent litigants or harried employers." *Buckley*, 977 F.2d at 228. It is vague, as conceded by the Commission, because not even the Commission knows whether

announcing views violates the clause. App 132-33a. And it fails strict scrutiny because it unconstitutionally reaches announced views when a more narrowly tailored proscription of pledging or promising certain results in a particular case or class of cases would suffice. *White I*, 536 U.S. at 770.

It also fails as applied to INRTL's questionnaire. The questionnaire only seeks announcements of views. App. 18a. Such announcements are protected in *White I*. That the Commission thinks it is possible to prohibit judicial candidates from answering the questionnaire renders the promises clause unconstitutional as applied to the questionnaire.

The commitments clause prohibits judicial candidates from "(ii) mak[ing] statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court ...." The commitments clause is unconstitutional since it contains the "appears to commit" language that makes it, like the commits clause, vague and overbroad, *see supra* Parts III.E.1 and IV.A.3, and it cannot be constitutionally be applied to the questionnaire. *See supra* Part III.E.2. And, like the commits clause, the commitments clause fails strict scrutiny. *See Family Trust Foundation of Kentucky v. Kentucky Judicial Conduct Commission*, 388 F.3d 224, 228 (6th Cir. 2004) (affirming a preliminary injunction of Kentucky's commitments clause because "Kentucky views Canon 5B(1)(c) as the functional equivalent of an announce clause" and that " the State is unlikely to succeed in light of the binding precedent in *White*.").

Review of the constitutionality of the promises and commitments clauses is warranted.

Conclusion

For the foregoing reasons, this Court should issue the requested writ of certiorari, consolidate its consideration with the companion *Siefert* case, and decide this matter on the merits.

Respectfully submitted,

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

TORREY BAUER, DAVID CERTO, AND INDIANA RIGHT TO LIFE, *Plaintiffs-Appellants*, *v.* RANDALL T. SHEPARD ET AL., *Defendants-Appellees*. [a complete list of Defendants is furnished in the Petition's Parties to Proceedings Section]	No. 09-2963 D.C. No. 3:08-cv-00196 OPINION

Appeal from the United States District Court
for the Northern District of Indiana
Theresa L. Springmann, District Judge

Argued: December 3, 2009

Decided: August 20, 2010

Before EASTERBROOK, Chief Judge, and MANION and EVANS, Circuit Judges.

OPINION

EASTERBROOK, Chief Judge.

The Supreme Court held in *Republican of Minnesota v. White*, 536 U.S. 765, 122 S.Ct. 2528, 153 L.Ed.-2d 694 (2002)(*White I*), that elected judges, and candi-

dates for judicial office, have a right under the first amendment to declare their legal views to the electorate during their campaigns. The decision left open myriad questions of implementation, and litigation has ensued across the country in those states that give the voters some say in choosing judges-either through direct election or by retention votes on judges who came to office by appointment. Recently we held that Wisconsin violated the Constitution by forbidding judges to be members of political parties, but that rules restricting partisan activities (such as endorsing a candidate for non-judicial office), and personal solicitation of funds, are valid. *Siefert v. Alexander,* 608 F.3d 974 (7th Cir.2010). Today's appeal concerns provisions of Indiana's Code of Judicial Conduct. Some judges in Indiana are appointed by the Governor but must run in retention elections. Others are directly elected. Article VII of Indiana's Constitution provides the details.

I

Indiana Right to Life, Inc., sends questionnaires to candidates for election or retention, asking recipients to state, among other things, whether they agree with *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), which held many forms of abortion legislation unconstitutional, and whether they subscribe to propositions such as: "I believe that the unborn child is biologically human and alive and that the right to life of human beings should be respected at every stage of their biological development." (The district court's opinion includes excerpts that convey the gist of all nine questions.) Most recipients have either ignored this questionnaire or told Indiana Right to Life that

they fear giving answers could jeopardize their judicial careers because of provisions in the state's Code of Judicial Conduct.

Indiana Right to Life filed suit seeking to have these provisions held invalid, but its suit was dismissed for want of standing, because no person actually or potentially covered by the Code was a plaintiff. *Indiana Right to Life, Inc. v. Shepard,* 507 F.3d 545 (7th Cir.2007). Indiana Right to Life then recruited a candidate for judicial office (Torrey Bauer) and a sitting judge (David Certo) as plaintiffs to join it in this new suit. The candidate and the judge both say that they refrain from speaking about abortion, and other controversial topics, because they fear the prospect of sanctions under the Code. Bauer answered the group's 2008 questionnaire but says that he will keep silent in the future because of the risk this would pose to his judicial career should he be elected. He expresses concern that his 2008 answers may come back to haunt him should he be elected. Certo has not answered the group's questionnaire in any year. He, too, says that the Code has led to silence.

While this suit was pending in the district court, Indiana substantially amended its Code of Judicial Conduct, in light of changes to a model code published by the American Bar Association. The revised Code, which took effect on January 1, 2009, is the focus of this appeal-though plaintiffs also want an injunction against one provision that has been removed from the Code but was in force when Bauer answered the 2008 questionnaire.

Plaintiffs challenge four provisions (or associated groups of provisions) in the current Code and one

provision in the version applicable to 2008. The first comprises Rules 2.10(B) and 4.1(A)(13), which forbid judges and candidates in judicial elections to make commitments that are inconsistent with the impartial performance of judicial office. The parties call these rules the "commits clauses." Canon 5A(3)(d) of the older Code covered similar ground but was broader; it is the provision relevant to Bauer's 2008 answers. The second is Rule 2.11(A), which requires recusal when a judge's impartiality "might reasonably be questioned." This the parties call the "recusal clause." Plaintiffs direct special fire at subsection 2.11(A)(5), which requires recusal if the judge "has made a public statement ... that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy." This specifies a concrete consequence of violating the commits clauses. The third group comprises Rule 4.1(A)(1) and (2), which limits the political activities of Indiana's judges (the parties call these the "partisan-activities clauses"), and the fourth comprises limits on fundraising set out in Rule 4.1(A)(4) and (8) (the "solicitation clauses").

Defendants are the members of two bodies: the Indiana Commission on Judicial Qualifications and the Indiana Disciplinary Commission. Some of the defendants are judges (Randall Shepard, the lead defendant, is the state's Chief Justice), but they are sued in their capacity as members of these commissions rather than as judges. The Commission on Judicial Qualifications receives and investigates complaints against judges and candidates for judicial office. It has some enforcement power over minor offenses and can issue public admonitions if the subject agrees; but only the state's

Supreme Court can remove a judge from office or impose substantial discipline, and only a judicial body (such as a court of appeals) can remove a judge from a particular case under the recusal clause. As a practical matter, an injunction forbidding the Commission to bring any supposed violation of the contested clauses to the attention of the state's Supreme Court would give plaintiffs the relief they want. The Indiana Disciplinary Commission investigates and prosecutes cases of misconduct by attorneys; again only the state judiciary can take any significant disciplinary action. We do not refer to the Disciplinary Commission again; every reference to "the Commission" is to the Indiana Commission on Judicial Qualifications.

The district court deemed moot Bauer's challenge to the pre-2009 version of the Code. The court concluded that plaintiffs have standing to challenge the version now in force and held that all of the contested provisions are constitutional. 634 F.Supp.2d 912 (N.D.Ind.2009).

II

Defendants contend that plaintiffs lack standing to sue. Standing exists when the plaintiff suffers an actual or impending injury, no matter how small; the injury is caused by the defendant's acts; and a judicial decision in the plaintiff's favor would redress the injury. See, e.g., *Summers v. Earth Island Institute,* --- U.S. ----, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009); *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 102-04, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). Bauer and Certo have not been injured yet, but the existence

of a statute implies a threat to prosecute, so pre-enforcement challenges are proper, because a probability of future injury counts as "injury" for the purpose of standing. See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Brandt v. Winnetka*, No. 09-3709 (7th Cir. July 20, 2010); *520 South Michigan Avenue Associates, Ltd. v. Devine*, 433 F.3d 961 (7th Cir.2006). We held in *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224 (7th Cir.1993), another pre-enforcement suit by a judge who disagreed with a state's limits on campaign speech, that standing had been established. This case is not materially different. Because Bauer and Certo have standing, it is unnecessary to decide whether Indiana Right to Life independently has standing.

The district court thought that Bauer's challenge to the pre-2009 Code became moot when the Code was amended. To say that a claim is moot is to say that it is too late for the judiciary to affect anyone's entitlements. With respect to Bauer's claim, however, the suit is too early rather than too late. It is unripe, not moot.

If Bauer should be elected in 2010 or later, the Commission might open a proceeding based on his answers in 2008, and the Indiana Supreme Court might remove him from office or discipline him in some other fashion. The amendment of the Code in 2009 does not eliminate the possibility of prosecuting and punishing earlier violations. Nor does the preliminary injunction preventing implementation of former Canon 5A(3)(d), which was in force when Bauer answered the

2008 questionnaire but has since been vacated. An expired or vacated injunction does not prevent a unit of government from punishing conduct, committed before the vacatur, that violates its laws. *See Crane v. Indiana High School Athletic Association,* 975 F.2d 1315, 1318-19 (7th Cir.1992); *Hoskins Lumber Co. v. United States,* 20 F.3d 1144 (Fed.Cir.1994). Cf. *Hampton Tree Farms, Inc. v. Yeutter,* 956 F.2d 869, 871 (9th Cir.1992) ("[O]nce an injunction in a civil case has been invalidated, rights granted under the injunction no longer exist and cannot be enforced."). So the dispute is not moot.

But before Bauer can face any consequence for his answers in 2008, a series of events must happen: (a) he must be elected to the state judiciary; (b) the Commission must decide to prosecute, even though an injunction was outstanding when Bauer gave his answers, and even though the Commission has *never* prosecuted any judge who answered the questionnaire (as about 10 judges or candidates did in full in 2008; about 20 more answered some questions); and (c) the Supreme Court of Indiana must impose discipline. That's too many unlikely steps to justify constitutional adjudication. See *MedImmune, Inc. v. Genentech, Inc.,* 549 U.S. 118, 127, 127 S.Ct. 764, 166 L.Ed.2d 604 (2007); *Brandt v. Winnetka;* and *Lawson v. Hill,* 368 F.3d 955 (7th Cir.2004).

Because Canon 5A(3)(d) is no longer in force, neither Bauer nor anyone else can be "chilled" by the risk of future punishment. When deciding what to say or avoid today, any judge or judicial candidate looks to the current Code, not to provisions that were abrogated at the end of 2008. There is accordingly no need for

prospective relief concerning pre-2009 rules. If the Commission ever hales Bauer (or anyone else) before the Supreme Court of Indiana on a charge of violating the former Canon 5A(3)(d), a defense based on the first amendment can be raised and adjudicated in the regular course.

III

Siefert disposes of one set of issues in this appeal and strongly influences another. We start with the fundraising question.

Rule 4.1(A) of Indiana's Code of Judicial Conduct provides:

> Except as permitted by law,* or by Rules 4.1(B), 4.1(C), 4.2, 4.3, and 4.4, a judge or a judicial candidate* shall not: ...
>
> (4) solicit funds for, pay an assessment to, or make a contribution* to a political organization or a candidate for public office; ...
>
> (8) personally solicit* or accept campaign contributions other than through a campaign committee authorized by Rule 4.4....

The asterisks, which are part of the Code, denote defined terms. The definitions say that "law" includes constitutions, statutes, rules, and decisional law; that "contribution" include both financial and in-kind support "which, if obtained by the recipient otherwise, would require a financial expenditure"; and that "personally solicit" means "a direct request made by a judge or a judicial candidate for financial support or in-kind services, whether made by letter, telephone, or any other means of communication."

Siefert dealt with this provision of Wisconsin's judicial-ethics rules:

> A judge, candidate for judicial office, or judge-elect shall not personally solicit or accept campaign contributions. A candidate may, however, establish a committee to solicit and accept lawful campaign contributions. The committee is not prohibited from soliciting and accepting lawful campaign contributions from lawyers. A judge or candidate for judicial office or judge-elect may serve on the committee but should avoid direct involvement with the committee's fundraising efforts. A judge or candidate for judicial office or judge-elect may appear at his or her own fundraising events. When the committee solicits or accepts a contribution, a judge or candidate for judicial office should also be mindful of the requirements of SCR 60.03 and 60.04(4).

Wisconsin Supreme Court Rule 60.06(4). (The language we have quoted is from the version effective when *Siefert* was decided; Rule 60.06(4) has since been amended slightly.) The court held that this rule is consistent with the Constitution. We invited the parties to file supplemental memoranda discussing *Siefert's* effect on this litigation. Indiana contends that its solicitation rules match Wisconsin's in all material respects and that *Siefert* therefore controls. Plaintiffs acknowledge that the *rules* are fundamentally the same but contend that the parties' *situations* differ: Judge Certo wants to raise money from family members and former classmates at college and law school,

as well as the general public and lawyers at large.

For the purpose of a personal-solicitation rule such as this, the fact that the judge went to law school at the same time as a potential donor cannot make a difference. The potential for actual or perceived mutual back scratching, or for retaliation against attorneys who decline to donate, discussed in *Siefert*, is the same whether or not the judge knows the potential donor's first name. Asking family members for support poses less of this risk-unless the judge plans to ask distant as well as immediate relatives. Laws need not contain exceptions for every possible situation in which the reasons for their enactment are not present. It is the nature of rules to be broader than necessary in some respects. *Siefert* shows that Indiana's rules are not facially unconstitutional. Indiana may well be willing to make exceptions for close relatives-recall that Rule 4.1(A) begins "[e]xcept as permitted by law" and defines "law" to include both regulations and decisional law. Rule 3.7(A)(2) already contains one exception for solicitations from a judge's family. A federal court should not assume that a state will act unreasonably. Judge Certo should follow Indiana's procedures for obtaining advice with respect to contributions from family members.

A month after we released our opinion in *Siefert*, the sixth circuit concluded that a personal-solicitation rule is unconstitutional. *Carey v. Wolnitzek*, 2010 U.S.App. LEXIS 14367 (6th Cir. July 13, 2010). The panel in *Carey* did not question the propriety of limits on in-person solicitation, where the possibility of reward or retaliation is great est, but concluded that Kentucky's rule is substantially overbroad because it

covers solicitation by mass mailing. A machine-generated letter with the judge's machine-generated signature is not materially different from a machine-generated letter with a campaign committee's imprimatur, the court concluded. Certo has not made anything of the fact that the definition of "personally solicit" in Indiana's Code includes letters, so it is unnecessary to address the distinction drawn in *Carey* between in-person and written solicitations. A conflict among the circuits preceded *Siefert*. Compare *Republican Party of Minnesota v. White*, 416 F.3d 738, 763-66 (8th Cir.2005) (en banc) *(White II)* (holding solicitation rules unconstitutional), and *Weaver v. Bonner*, 309 F.3d 1312, 1322-23 (11th Cir.2002) (same), with *Stretton v. Disciplinary Board*, 944 F.2d 137, 144-46 (3d Cir.1991) (holding valid a rule similar to Indiana's). Nothing we can do here could create harmony among the circuits, so there is no reason to depart from the approach taken so recently in this circuit.

Siefert also affects analysis of the partisan-activities rules, subsections (1) and (2) of Rule 4.1(A). We repeat the introductory clause to provide context:

> Except as permitted by law,* or by Rules 4.1(B), 4.1(C), 4.2, 4.3, and 4.4, a judge or a judicial candidate* shall not:
>
> (1) act as a leader in or hold an office in a political organization;*
>
> (2) make speeches on behalf of a political organization;
>
> (3) publicly endorse or oppose a candidate for

any public office....

Siefert held that Wisconsin's equivalent of Rule 4.1(A)(-3) is constitutional. Our plaintiffs do not challenge that subsection, but they do challenge subsections (1) and (2). Plaintiff Certo contends that he wants to serve as a delegate at the Indiana State Republican Convention, speak at political clubs on behalf of persons running for judicial office as Republicans, speak to students on behalf of the Republican Party in general, and encourage the public at large to donate money to the Republican Party. The Republican Party is a "political organization," which the Code defines as "a political party or other group sponsored by or affiliated with a political party or candidate, the principal purpose of which is to further the election or appointment of candidates for political office."

Although *Siefert* did not address limits on leadership roles in political parties or making speeches on behalf of political organizations, the way in which it analyzed public endorsements (see 608 F.3d at 983-88) establishes that subsections 4.1(A)(1) and (2) are valid. *White I* permits a candidate for judicial office (or retention in office) to speak freely in support of his own election; *Siefert* concluded that this does not allow a judge to use the prestige of the office to assist other persons. That kind of electoral activity on behalf of third parties is covered, we held, by the balancing approach that *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), adopts for speech by public employees-and by two of *Pickering-'s* best-known sequels, *Civil Service Commission v. Letter Carriers*, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973), and *Broadrick v. Oklahoma*, 413 U.S. 601,

93 S.Ct. 2908, 37 L.Ed.2d 830 (1973), which hold that the Hatch Act, 5 U.S.C. §§ 7321-26, and comparable state laws are compatible with the first amendment.

The Hatch Act and similar state laws limit the ability of public employees to engage in politics. They can join political parties, but they can't distribute political literature at work, hold office in political parties, or make speeches on behalf of candidates for political office. (Different employees are subject to different restrictions; the most stringent ones apply to those, such as agents of the FBI, that Congress has thought should be apolitical.) *Siefert* holds that similar limitations for judges are valid, for three principal reasons: first, judges no less than FBI agents must be seen as impartial if judicial decisions are to be accepted by the public, and participation in politics undermines the appearance of impartiality; second, judges are not entitled to lend the prestige of office (which after all belongs to the people, not to the temporary occupant) to some other goal; third, states have a compelling interest in "preventing judges from becoming party bosses or power-brokers" (608 F.3d at 987), something that would undermine *actual* impartiality, as well as its appearance. Those considerations support limits on political leadership and speechifying as fully as they support limits on partisan endorsements (the subject of *Siefert*).

Rule 4.1(A)(2) says that judges cannot make speeches "on behalf of" political organizations. This probably equates to acting as a party's representative; it is therefore doubtful that this rule forbids all of the activity in which Judge Certo wishes to engage (though Rule 4.1(A)(1) assuredly forbids him from attending a

political convention as a delegate). Kentucky's political-activity rule, held invalid in *Carey*, is much broader than Indiana's, forbidding a judge even to reveal his political affiliation. (*Siefert* held that such a rule in Wisconsin violates the first amendment.) To the extent there is uncertainty about what it means to speak "on behalf of" a political organization, Indiana provides means of clarification. Judge Certo should use them. The Commission already has issued several clarifying advisory opinions, which we need not recount. For current purposes it is enough to say that the principal applications of subsections 4.1(A)(1) and (2) are valid, which means that they cannot be enjoined across the board. (We discuss later how Indiana's system of resolving marginal or otherwise uncertain matters of application affects plaintiffs' contention that all of the rules are unconstitutionally vague.)

The desire to prevent judges from using the prestige of office for other ends underlies a great deal of the Code of Judicial Conduct for United States Judges. Federal judges can't endorse political candidates or participate in fundraising, even for nonpartisan institutions such as law schools. A judge can't serve on the board of a charitable organization if that organization is involved in litigation-and the fact that the judge plans to recuse from cases for or against the organization does not permit him to serve on the board. The judge cannot accept most positions on governmental panels outside the judicial branch. These rules, and other related ones, are in Canons 4 and 5 of the Code of Judicial Conduct for United States Judges and are elaborated in many advisory opinions. Canon 5 also forbids a judge to act as a leader in a political organiza-

tion, make speeches "for" a political organization, and so on. If subsections 4.1(A)(1) and (2) of Indiana's Code are unconstitutional, so are Canons 4 and 5 of the federal judges' Code. We very much doubt that *White I* licenses federal and state judges to give stump speeches for candidates running for President, senator, governor, or mayor, or act as leaders of political parties.

Plaintiffs say that a judge who does not identify himself *as* a judge when making a political speech, or serving as an officer or delegate in a political party, has not misused the prestige of the office and does not imperil the public's belief in the impartiality of the judiciary. Yet the audience (or at least the reporters covering the speech) knows who is on the bench and thus might think that the judiciary is behind the endorsement, or implicitly threatening retaliation against those who do not accept the judge's recommendation. The Court remarked in *Letter Carriers* that one principal justification for the Hatch Act is the preservation of public confidence in the bureaucracy. 413 U.S. at 565. That is even more true about rules that keep judges out of active politics. See *Caperton v. A.T. Massey Coal Co.*, ---U.S. ----, ---- - ----, 129 S.Ct. 2252, 2266-67, 173 L.Ed.2d 1208 (2009). The judicial system depends on its reputation for impartiality; it is public acceptance, rather than the sword or the purse, that leads decisions to be obeyed and averts vigilantism and civil strife.

That judges can recuse when their favored political candidates are litigants is not an answer to this concern. Many a case presents political issues without involving a politician. Political platforms, and candi-

dates, take strong positions on health care, torts, labor relations, crime, immigration, abortion, taxes, and a hundred more contentious issues. Unless a judge who speaks on behalf of a party, or serves as a party's officer, recuses in all of these cases-which is to say, almost every case that comes before a court-the public would have good reason to believe that the judge is deciding according to the party's platform rather than the rule of law. Allowing judges to participate in politics would poison the reputation of the whole judiciary and seriously impair public confidence, without which the judiciary cannot function. Preserving that confidence is a compelling interest. No one could contemplate with equanimity the prospect of a state's chief justice also being the head of a political party and doling out favors or patronage, or deciding who runs for legislative office. States are entitled to ensure not only that judges behave in office with probity and dignity, but also that their conduct makes it possible for them to serve impartially. But the politician-judge will be disqualified so often that he will have the equivalent of a paid vacation, while other judges must work extra to protect litigants' entitlement to expeditious decisions.

Letter Carriers said that it is constitutional to curtail bureaucrats' political activity to ensure public confidence that civil servants "administer the law in accordance with the will of Congress, rather than in accordance with their own or the will of a political party." 413 U.S. at 564-65. Exactly the same can be said about judges and the judiciary. When a state requires judges to stand for office, it cannot insist that candidates remain silent about why they rather than

someone else should be elected. That's the holding of *White I.* But the rationale of *Letter Carriers* remains, and is not undercut by *White I,* for political races other than the judge's own. Subsections 4.1(A)(1) and (2) are constitutional.

Although *Wersal v. Sexton,* 2010 U.S.App. LEXIS 15664 (8th Cir. July 29, 2010), recently held that Minnesota's equivalents of Rule 4.1(A)(3) (the no-endorsement rule) and Rule 4.1(A)(4) and (8) (the solicitation limits) violate the first amendment, it did not discuss (or even cite) *Pickering, Letter Carriers,* or any of the Supreme Court's other decisions concerning restrictions on public employees' political activities. The majority in *Wersal* concluded that the court's en banc decision in *White II* requires the application of strict scrutiny to all ethical rules that affect either judicial campaigns or judges' participation in campaigns for other offices. We are unpersuaded and shall stick with *Siefert's* analysis, which differentiates what judges can do in their own campaigns (the subject of *White I*) from how judges can participate in other persons' campaigns (the subject of *Letter Carriers* and similar decisions).

IV

Rules 2.10(B) and 4.1(A)(13) are the "commits clauses":

> [Rule 2.10(B)] A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial* performance of the adjudicative duties of judicial office.

> [Rule 4.1(A)] Except as permitted by law,* or by Rules 4.1(B), 4 .1(C), 4.2, 4.3, and 4.4, a judge or a judicial candidate* shall not: ... (13) in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial* performance of the adjudicative duties of judicial office.

The Code defines "impartial" as "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge." Plaintiffs Bauer and Certo say that these rules have discouraged them from answering Indiana Right to Life's questionnaire, and the group relates that most judges who have replied have said the same thing; only a handful of judges and judicial candidates in Indiana have stated their positions on all of the nine questions.

Some, perhaps many, of the state's judges and judicial candidates may be using the commits clauses as a pretext to keep out of a political minefield. For no matter what a person says in response to Indiana Right to Life's questionnaire, some readers are going to be unhappy and will vote against the candidate as a result. It is hard to see how judges and candidates could have a substantial fear of adverse consequences under the *current* version of Indiana's Code. None of the nine questions calls for a "commitment" or "promise" on any issue. A judge who answers yes to the first proposition ("I believe that the unborn child is biologically human and alive and that the right to life of human beings should be respected at every stage of

their biological development") has not committed to defying *Roe v. Wade* and its sequels. The proposition concerns morals, not conduct in office. Statements of views on moral and legal subjects do not imply that the speaker will act in accord with his preferences rather than the law. Every judge enforces laws and applies judicial decisions for which he would not have voted.

Similarly, a judge who states that he thinks *Roe v. Wade* wrongly decided has not committed to disregard that decision. Justices White and Rehnquist dissented in *Roe* itself, explaining at length why they thought the majority mistaken. But this did not commit them to any particular outcome in a future dispute about abortion. Many a judge dissents in one case but later follows the majority decision on the basis of *stare decisis*-and occasionally a judge who has written a decision, and thus commits to its correctness, writes a decision overruling his earlier opinion after concluding that he erred. See, e.g., *United States v. Scott*, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978) (Rehnquist, J.), overruling *United States v. Jenkins*, 420 U.S. 358, 95 S.Ct. 1006, 43 L.Ed.2d 250 (1975) (Rehnquist, J.). A judge whose mind is open to new evidence and arguments is not "committed" to any outcome in tomorrow's litigation.

White I holds that judges and judicial candidates are entitled to announce their views on legal and political subjects that will come before them as judges. 536 U.S. at 788. That's all Indiana Right to Life's questionnaire asks them to do. Defendants observe that some judges do answer the questionnaire, and that, even under the pre-2009 version of the Code, none has been charged by the Commission with mis-

conduct. Most judges and judicial candidates have views on issues such as those the questionnaire poses, and are entitled to have them. Making these views known does not call their impartiality into question. "[S]ince avoiding judicial preconceptions on legal issues is neither possible nor desirable, pretending otherwise by attempting to preserve the 'appearance' of that type of impartiality can hardly be a compelling state interest". *Id.* at 778.

Still, given the posture of this case-the suit was dismissed on the pleadings-we must assume that plaintiffs Bauer and Certo are in fear of sanctions under the Code if they answer the questions. This fear may be exaggerated, but if it is real (as we must assume it is), and not irrational (it isn't), it stifles speech. So we must decide whether there is anything wrong with the commits clauses. Plaintiffs say that they are unconstitutional because overbroad and vague.

Plaintiffs treat as "overbroad" any law forbidding any speech that is constitutionally protected. It is not clear to us that any speech covered by the commits clauses is constitutionally protected, as *White I* understands the first amendment. How could it be permissible to "make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office"? The rule's own category (promises "inconsistent with the impartial performance of" judicial duties) identifies the sorts of speech that *White I* thought might be curtailed. A commits clause "secures a basic objective of the judiciary, one so basic that due process requires it: that litigants have a right to air their disputes before judges who have not committed to rule against them before

the opening brief is read." *Carey* at *43-44. Judges must decide on the basis of the law and the case's facts, not on "express ... commitments that they may have made to their campaign supporters or to others." *Buckley*, 997 F.2d at 227.

Although the Court held in *White I* that judges may state their views on contestable and controversial subjects-such as whether the exclusionary rule is wise policy, or whether mandatory minimum sentences should be repealed-it did not hold that judges may make commitments or promises about behavior in office. Imagine a judge or judicial candidate who said: "I will issue a search warrant every time the police ask me to." That speaker is promising to defy the judicial oath of office. Or imagine the statement: "I will always rule in favor of the litigant whose income is lower, so that wealth can be redistributed according to the principles of communism." (More plausibly, a candidate might say that he will award damages against drug companies, whether or not the drug has been negligently designed or tested, because they charge "too much" for their products.) Again that person is promising to disobey the law and disregard the litigants' entitlements. Nothing in *White I* deals with statements of this flavor, or any other promise to act on the bench as a partisan of a political agenda.

But it is unnecessary to decide whether *some* protected speech might come within the scope of the commits clauses. For when the Supreme Court speaks of overbreadth, it does not mean a statute or rule that catches the occasional protected tidbit. All rules are overbroad in that sense. "Overbreadth" in the Supreme Court's jurisprudence has to do with *substantial*

amounts of protected speech. A law is unconstitutionally overbroad when "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Washington State Grange v. Washington State Republican Party,* 552 U.S. 442, 449 n. 6, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008) (internal quotation marks omitted). See also, e.g., *United States v. Stevens,* ---U.S. ----, ----, 130 S.Ct. 1577, 1587, 176 L.Ed.2d 435 (2010). Plaintiffs do not seriously contend that the commits clauses are overbroad in *that* sense.

Under Indiana's language, judges and candidates can tell the electorate not only their general stance ("tough on crime" or "tough on drug companies") but also their legal conclusions ("I would have joined Justice White's dissent in *Roe* " or "the death penalty should be treated as cruel and unusual punishment" or "I am a textualist and will not resort to legislative history" or "I will follow *stare decisis* " or "I am a progressive who will use a living-constitution approach"). Judges who have announced these views, on or off the bench, sit every day without being thought to have abandoned impartiality. Indeed, judges who have announced legal views in exceptional detail, by writing a treatise about some subject (Weinstein on Evidence, or Martin on Bankruptcy) have not made an improper "commitment," even though a litigant can look up in the treatise exactly how the judge is apt to resolve many disputes. A judge who promises to ignore the facts and the law to pursue his (or his constituents') ideas about wise policy is problematic in a way that a judge who has announced considered views on legal subjects is not. The commits clauses condemn the former and allow the latter. That's because they are

limited to commitments that are inconsistent with impartial adjudication and thus differ considerably from the rule at issue in *Carey*, where the sixth circuit expressed concern that limiting *all* commitments on "issues" would prevent a judicial candidate from declaring support for the rule of law or adherence to *stare decisis*. *Carey* at *45-49.

As plaintiffs see things, however, the phrase "inconsistent with the impartial performance of the adjudicative duties of judicial office" saves the commits clauses from a first amendment challenge by making them so vague that they violate the due process clauses. For what promises *are* "inconsistent with the impartial performance of the adjudicative duties of judicial office"? Neither the commits clauses nor the Code's definitions pin the meaning down. We have given a few examples, such as a promise to issue search warrants without bothering to read the affidavits, but the principle is clear only in these extremes. A candidate who says that he will never let a prisoner off on a "technicality" could be promising to ignore the fourth amendment (if in his view the rule against unreasonable searches and seizures is a "technicality") but could mean instead only that he plans to enforce the harmless-error and plain-error doctrines, see Fed.R.Crim.P. 52; Ind. R.App. P. 66(A), under which errors that don't impair a defendant's substantial rights do not justify setting aside a jury's verdict.

Context may help to disambiguate a statement, but there is an irreducible risk that a promise may be misunderstood-or that the Commission and the Supreme Court of Indiana may treat as "inconsistent with the impartial performance of the adjudicative duties of

judicial office" even the sort of statements that are squarely protected by *White*. We think that statements such as "judges have been too ready to find antitrust problems with mergers" or "mandatory minimum sentences are unjust, and I will read those statutes narrowly" or "drunk drivers are a menace and should be dealt with severely" or "abortion should be freely available, and I will grant a minor's application for bypass of parental consent when a statute gives me that discretion" are outside the scope of the commits clauses. But will the Commission and the state judiciary agree?

The best way to find out is to wait and see. The Commission issues advisory opinions that reduce uncertainty, and when the Commission brings a proceeding the state judiciary will issue an opinion that makes the rule more concrete. Plaintiffs want us to deem the law vague by identifying situations in which state officials *might* take an untenably broad reading of the commits clauses, and then predicting that they *will* do so. It is far preferable, however, and more respectful of our judicial colleagues in Indiana, to assume that they will act sensibly and resolve the open questions in a way that honors candidates' rights under the first amendment.

When a statute is accompanied by an administrative system that can flesh out details, the due process clause permits those details to be left to that system. Parts of the Hatch Act are every bit as vague as the commits clauses, but in *Letter Carriers* the Court held that problems of implementation could be tackled by administrative adjudication. 413 U.S. at 580. Similarly, in *Parker v. Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41

L.Ed.2d 439 (1974), the Court held that an article of the Uniform Code of Military Justice making it a court-martial offense to engage in "conduct unbecoming an officer and a gentleman" is not unconstitutionally vague, because military tribunals have elaborated on what is "unbecoming" for an officer and made it more specific than the unadorned words. The National Labor Relations Act is full of vague terms, and the National Labor Relations Board has yet to make all of them concrete, but no one supposes that the whole Act could be chucked out. The Justices have been chary of holding laws unconstitutional "on their face" precisely because they have recognized that vagueness will be reduced through a process of interpretation. See also, e.g., *United States v. Skoien*, No. 08-3770 (7th Cir. July 13, 2010) (en banc), slip op. 17. Advisory opinions under the Code of Judicial Conduct are a more appropriate procedure than summary condemnation by a federal court before the Commission has an opportunity to tackle the ambiguities in the 2009 version of the Code. (Another way to reach the same result would be via *Pullman* abstention, see *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), withholding federal decision until the state agency has had a chance to reduce the ambiguity.)

It is not as if Indiana could make everything clear by changing a few words. The main source of ambiguity in the commits clauses is the protean word "impartial." It has been around for a long time and has resisted precise definition. It is easy to say that a judge who has a financial stake in the outcome is not impartial. But how about a judge who receives a campaign contribution from one side? A big campaign contribution? A *whopping* campaign contribution? See *Caperton*

($3 million from one donor, more than all other contributions combined). A judge who has promised constituents to use tort law to soak out-of-state manufacturers for the benefit of instate plaintiffs? Plaintiffs have not suggested any revised wording that would be more specific but achieve the state's objective. Courts and administrative bodies provide greater certainty by examples (advisory opinions stating that such-and-such behavior is, or is not, compatible with "the impartial performance of the adjudicative duties of judicial office").

Plaintiffs contend that the Commission has its mind made up on many subjects and therefore is not a suitable body to disambiguate the Code. Yet declarations by the Commission (more often, by its staff rather than its members) that the body views one or another kind of statement "with disfavor" (or some similar phrase) does not call the administrative process into question. When the Judicial Conference's Committee on Codes of Conduct, the body that issues advisory opinions interpreting the Code of Conduct for United States Judges, issues an opinion or guide saying that some particular conduct is problematic, it is doing exactly the same thing. People may not always like the information they receive, but these examples curtail ambiguity. Anyway, the Commission is a prosecutorial body in Indiana; final decisions are made by the state's Supreme Court. Under the Hatch Act, the Uniform Code of Military Justice, and the National Labor Relations Act, a prosecutor brings charges of wrongdoing, and the ensuing adjudication adds to the law's specificity. Just so in Indiana. The Commission's prosecutorial role sets in motion a process that yields greater certainty.

V

The recusal clause, Rule 2.11(A)(5), names one consequence of violating the commits clauses. Rule 2.11(A) provides:

> A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality* might reasonably be questioned, including but not limited to the following circumstances:
> ...
> (5) The judge, while a judge or a judicial candidate,* has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

A judge's failure to recuse, when this clause applies, is a ground for discipline. Indiana Admission & Discipline Rule 25(III)(A)(7).

What we have said about the commits clauses implies the validity of the recusal clause. States have a strong interest in ensuring that judges come to their cases without precommitments. See *Caperton* and the many decisions it cites. But there is more to be said. The recusal clause does not present a constitutional issue at all.

The recusal clause applies to a judge in his role as public employee, not his role as candidate. It specifies how a public employee will perform official duties (or, rather, which public employee will be assigned to which duties). *Garcetti v. Ceballos*, 547 U.S. 410, 126

S.Ct. 1951, 164 L.Ed.2d 689 (2006), holds that speech as part of a public employee's duties is categorically outside the scope of the first amendment. The state, as employer, may control how its employees perform their work, even when that work includes speech (as a judge's job does). Rule 2.11(A)(5) represents a decision by the State of Indiana to assign to each lawsuit a judge who has not made any statement "that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy." That decision is unexceptionable.

No public employee is entitled to do any particular task; a state may select the employee who can best do the job. *Gregory v. Ashcroft*, 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991), tells us that this means that a state may choose to assign appeals to younger judges (the Court held that the Age Discrimination in Employment Act does not apply to an elected judiciary). Likewise a state may decide to assign each case to a judge whose impartiality is not in question. All Rule 2.11(A)(5) does is allocate cases among judges, just as 28 U.S.C. § 455(a) does for federal judges. States are entitled to protect litigants by assigning impartial judges before the fact, as well as by removing partial judges afterward. As we put it in *Siefert*, 608 F.3d at 985, "[i]t is small comfort for a litigant who takes her case to state court to know that while her trial was unfair, the judge would eventually lose an election".

We modify the district court's judgment to provide that the challenge to the 2008 version of the Code is dismissed as unripe, not as moot. As modified, the judgment is AFFIRMED.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF INDIANA

FORT WAYNE DIVISION

TORREY BAUER, *et al.*, Plaintiffs, vs. RANDALL T. SHEPARD, *et al.*, Defendants.	Case No. 3:08-CV-196-ts July 7, 2009 **OPINION AND ORDER**

THERESA L. SPRINGMANN, District Judge.

The people of the State of Indiana through the Indiana Constitution have granted the Indiana Supreme Court authority to regulate the conduct of Indiana lawyers and judges. In exercising this authority, the Indiana Supreme Court has adopted the Indiana Rules of Professional Conduct and the Indiana Code of Judicial Conduct. In adopting these rules of conduct, the court has balanced values important to the administration of justice (such as judicial fairness, impartiality, independence, integrity, and competence, the principles of justice, and the rule of law) against other values (such as the speech rights of judges and judicial candidates). Additionally, in response to

decisions by federal courts regarding the constitutionality of various standards governing judicial conduct, the Indiana Supreme Court has amended the Indiana rules, even as recently as within the last year.

In this case, a nonprofit issue advocacy organization, a judge, and an attorney who recently ran for judicial office challenge several rules adopted by the Indiana Supreme Court that govern the conduct of judges and judicial candidates. They argue that these rules unconstitutionally restrict their free speech and association rights in violation of the First Amendment to the Constitution of the United States of America.

This matter is now before the Court for ruling on cross-motions for summary judgment filed by the parties. Although the parties do not highlight any real dispute over material facts, they do pose one overarching legal question: do certain rules adopted by the Indiana Supreme Court to govern the conduct of judges and candidates for judicial office violate the free speech and association rights of judges and judicial candidates as protected by the First Amendment? For the reasons stated in this Opinion and Order, the Court finds that the rules challenged in this lawsuit do not violate the Plaintiffs' First Amendment speech and association rights.

PROCEDURAL BACKGROUND

On September 29, 2004, Indiana Right to Life, Inc. (IRL) and two other plaintiffs (who were not judicial candidates) instituted a lawsuit (*Indiana Right to Life, Inc., et al. v. Randall T. Shepard,* Cause Number 4:04-CV-71 (*Shepard I*)) in this judicial district against members of the Indiana Commission on Judicial Qualifications (ICJQ) and the Indiana Disciplinary

Commission (IDC), seeking declaratory and injunctive relief, challenging the "pledges or promises clause" and the "commits clause" (Canon 5A(3)(d)(i) and (ii)) and the "recusal requirement" (Canon 3E(1)) of the Indiana Code of Judicial Conduct in effect at that time, and claiming that these provisions might prohibit judicial candidates from responding to an IRL questionnaire. Judge Allen Sharp denied the plaintiffs' request for a preliminary injunction. Ultimately, however, Judge Sharp permanently enjoined enforcement of the "pledges or promises clause" and the "commits clause," but denied the plaintiffs' request for a permanent injunction with respect to the "recusal requirement." *Ind. Right to Life, Inc. v. Shepard,* 463 F.Supp.2d 879 (N.D.Ind.2006). The defendants appealed, and the Seventh Circuit reversed, holding that the plaintiffs lacked standing to assert a First Amendment claim because they lacked sufficient evidence of willing speakers. *Ind. Right to Life, Inc. v. Shepard,* 507 F.3d 545 (7th Cir.2007). On January 4, 2008, that case was dismissed.

On April 18, 2008, IRL along with Torrey Bauer, an attorney and (at that time) a candidate for judge of the Kosciusko Superior Court, and Judge David Certo of the Marion Superior Court, instituted this lawsuit against members of the ICJQ and the IDC in their official capacities. The Plaintiffs claimed that provisions of the Code violate their rights under the First and Fourteenth Amendments to the United States Constitution. In their original Verified Complaint for Relief [DE 1], they sought injunctive relief barring enforcement of the "pledges or promises clause" (Canon 5A(3)(d)(i)), the "commits clause" (Canon 5A(3)(d)(ii)), and the "recusal requirement" (Canon 3E(1)) of the

Code in effect at that time. In addition to their Complaint, the Plaintiffs filed a Motion for Temporary Restraining Order [DE 3] and a Memorandum in Support [DE 4]. The Court construed the Motion as a request for a preliminary injunction because the Defendants had received notice of the Plaintiffs' request. On April 29, the Defendants filed a Memorandum in Opposition [DE 16]. On April 30, the Court conducted an evidentiary hearing, permitting the parties to present evidence and argument with respect to the request for a preliminary injunction. On May 6, the Court issued an Opinion and Order granting the Plaintiffs' request for a preliminary injunction and enjoining the ICJQ and the IDC from initiating disciplinary proceedings under the "pledges or promises clause" and the "commits clause" (Canon 5A(3)(d)(i) and (ii)) against judicial candidates who respond to the IRL's 2008 questionnaire until the Court issues a final decision on the merits.

On June 5, the Plaintiffs filed a Verified Amended Complaint for Relief [DE 25], in which they continued to challenge the "pledges or promises clause" (Canon 5A(3)(d)(i)), the "commits clause" (Canon 5A(3)(d)(ii)), and the "recusal requirement" (Canon 3E(1)). However, they added challenges to the "partisan activities clauses" (Canon 5A(1)(a) & (c)) and the "solicitation clauses" (Canon 5A(1)(e) & 5C(2)), as well as Canons 5A(1)(b) and 5C(1)(g). On July 16, the Defendants filed their Answer [DE 29].

On July 28, the Plaintiffs filed a Motion for Summary Judgment [DE 31] and supporting brief [DE 32]. On August 27, the Defendants responded by filing a Motion to Deny Plaintiffs' Motion for Summary Judgment or, Alternatively, to Continue Under Rule 56(f)

[DE 33] and Memorandum in Support [DE 34]. On September 8, the Indiana Supreme Court issued a press release indicating its adoption of a new Code of Judicial Conduct (or its amendment of the existing Code), which would go into effect on January 1, 2009, and on September 19, the Indiana Supreme Court issued its Order Amending Code of Judicial Conduct.[1] On September 11, the Plaintiffs filed a Response in Opposition [DE 35] to the Defendants' Motion. On September 25, the Court issued an Opinion and Order granting in part and denying in part the Defendants' Motion to Deny Plaintiffs' Motion for Summary Judgment or, Alternatively, to Continue Under Rule 56(f), and allowing the Defendants to file their Response to the Plaintiffs' Motion for Summary Judgment sixty days after the Plaintiffs respond to the Defendants' discovery requests.

On October 1, Plaintiff Certo filed a Motion for Preliminary Injunction and Temporary Restraining Order [DE 39] and a Memorandum in Support [DE 40]. On October 7, the Court conducted a telephone conference with the parties. During the conference, the Court raised the issue of the new Code adopted by the Indiana Supreme Court, which was to take effect on January 1, 2009. The Plaintiffs expressed their view that the 2009 Code was not substantially different

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[1]The Indiana Supreme Court has framed this as both a new Code and an amended Code, but for purposes of this case and the Plaintiffs' constitutional challenges, the label is not critically important. However, what is important to note is the fact that material changes were made to canons and rules challenged in this case.

from the pre-2009 Code, that there was no need to amend the Complaint or other submissions based upon the adoption of the new Code, and that their Motion for Summary Judgment was still viable, even as to the 2009 Code. The Defendants urged that relevant provisions of the Code were rewritten, that the 2009 Code renders issues regarding the pre-2009 Code moot, and that these differences have an impact on the Plaintiffs' Motion for Summary Judgment and any ruling the Court would enter on the Plaintiffs' Motion. On October 8, the Court issued an Order setting a discovery and briefing schedule on the Plaintiffs' Motion for Summary Judgment. On October 16, the Defendants filed a Memorandum in Opposition [DE 48] to Plaintiff Certo's Motion for Preliminary Injunction, and on October 21, Plaintiff Certo filed his Reply in Support [DE 50]. On October 22, the Court conducted a hearing on Plaintiff Certo's Motion for Preliminary Injunction. The parties then proceeded with discovery. The Defendants' response to the Plaintiffs' Motion for Summary Judgment was due on March 11, 2009, and the Plaintiffs' reply on April 1, but these deadline were later extended at the parties' request.

On March 23, 2009, 2009 WL 791548, the Court entered an Opinion and Order [DE 64] denying without prejudice as moot the Plaintiffs' Motion for Summary Judgment [DE 31] and Motion for Preliminary Injunction and Temporary Restraining Order [DE 39], based upon the Indiana Supreme Court's issuance of the new Code. The Court noted that the pre-2009 version of the Code no longer had legal effect, that the 2009 Code included provisions that corresponded (to some degree or another) to the challenged provisions of the pre-2009 Code, that the Plaintiffs' Verified Amended Complaint

for Relief and the other submissions of the parties were based on the pre-2009 version of the Code, and that the parties in their submissions had not adequately addressed the similarities and differences between the old Code and the new Code. For these reasons, the Court directed the parties to prepare submissions to address the differences between the pre-2009 version and the new Code and the impact (if any) of the differences on the Plaintiffs' constitutional claims. In the interest of consolidating issues addressed in disparate motions, addressing the Plaintiffs' claims based upon the current version of the Code, promoting judicial economy and efficiency, and achieving the orderly disposition of this case, the Court set deadlines for the parties to amend the pleadings and to file and brief any dispositive motions.

On April 6, the Plaintiffs filed a Verified Second Amended Complaint for Relief [DE 67].[2] In this Second Amended Complaint, the Plaintiffs challenge the "pledges, promises, or commitments clauses" (Rules

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[2]The Plaintiffs' Verified Second Amended Complaint for Relief now governs this suit, and the Verified Complaint for Relief and Verified Amended Complaint for Relief are superseded. *See Wellness Cmty®-Nat'l v. Wellness House,* 70 F.3d 46, 49 (7th Cir.1995) (holding that court's jurisdiction inquiry had to be based on amended complaint only because "it is well established that the amended pleading supersedes the original pleading"); *see also Flannery v. Recording Industry Ass'n of Am.,* 354 F.3d 632, 638 n. 1 (7th Cir.2004) (noting that "[i]t is axiomatic that an amended complaint supersedes an original complaint and renders the original complaint void").

2.10(B) & 4.1(A)(13)),[3] the "recusal clause" (Rule 2.11(A)), the "partisan activities clauses" (Rules 4.1(A)(1) & (2)), and the "solicitation clauses" (Rules 4.11(A)(4) & (8)) of the 2009 Code. The Plaintiffs ask the Court to declare these provisions of the 2009 Code unconstitutional, as well as Canon 5A(3)(d)(i) and (ii) of the former Code, and to enjoin their enforcement. On April 16, the Defendants filed their Answer [DE 69]. On May 1, the Plaintiffs filed a Motion for Summary Judgment [DE 70] and a Memorandum in Support [DE 71]. Also on May 1, the Defendants filed a Motion for Summary Judgment [DE 72], a Memorandum in Support [DE 73], and a Designation of Evidence and Exhibits in Support [DE 74]. On May 15, the Plaintiffs filed a Response in Opposition [DE 76] to the Defendants' Motion, and the Defendants filed a Memorandum in Opposition [DE 77] to the Plaintiffs' Motion. On June 1, the Plaintiffs filed a Reply in Support [DE 78] of their Motion, and the Defendants filed a Reply Memorandum in Support [DE 79] of their Motion. On June 18, the Defendants filed a Notice of Supplemental Authority [DE 80], and on June 23, the Plaintiffs filed a Response to Defendants' Notice of Supplemental Authority [DE 81].

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[3] The Verified Second Amended Complaint refers to both Rule 2.10(A)(5) and Rule 2.10(B). No Rule 2.10(A)(5) appears in the 2009 Code, but from their pleading it appears that the Plaintiffs intended to challenge Rule 2.10(B). Thus, the Court will treat the Plaintiffs' references to Rule 2.10(A)(5) as scrivener's errors and construe them as references to Rule 2.10(B), which the parties address in their summary judgment motions.

SUMMARY JUDGMENT STANDARD

The Federal Rules of Civil Procedure provide that motions for summary judgment should be granted "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R. Civ.P. 56(c). A genuine issue of material fact exists when "'there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.'" *AA Sales & Assocs. v. Coni-Seal, Inc.*, 550 F.3d 605, 608-09 (7th Cir.2008) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). Under Rule 56(e)(2), a party opposing a properly made and supported motion for summary judgment "may not rely merely on allegations or denials in its own pleading; rather its response must-by affidavits or as otherwise provided in this rule-set out specific facts showing a genuine issue for trial." If appropriate, summary judgment should be entered against a party who fails to so respond. Fed.R.Civ.P. 56(e)(2); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (holding that a court should enter summary judgment, after adequate time for discovery, against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial"). A court's role on summary judgment is not to weigh the evidence, make credibility determinations, or decide which inferences to draw from the facts, but instead to determine whether there is a genuine issue of triable fact. *Anderson*, 477 U.S. at 255, 106 S.Ct. 2505; *Washington v. Haupert*, 481 F.3d 543, 550 (7th

Cir.2007); *Payne v. Pauley*, 337 F.3d 767, 770 (7th Cir.2003). Thus, a court in ruling on a summary judgment motion construes all facts in the light most favorable to the nonmoving party and draws all reasonable inferences in that party's favor. *AA Sales & Assocs.*, 550 F.3d at 609.

When cross-motions for summary judgment are filed, the Court evaluates each motion on its merits. The filing of such cross-motions does not imply the absence of material fact issues. Additionally, the parties bear "different burdens of proof with respect to particular facts," and "different legal theories will have an effect on which facts are material." *R.J. Corman Derailment Servs., LLC v. Int'l Union of Operating Eng'rs, Local 150*, 335 F.3d 643, 647-48 (7th Cir.2003). The Court construes "all facts and inferences therefrom 'in favor of the party against whom the motion under consideration is made.' " *In re United Air Lines, Inc.*, 453 F.3d 463, 468 (7th Cir.2006) (quoting *Kort v. Diversified Collection Servs., Inc.*, 394 F.3d 530, 536 (7th Cir.2005)). Thus, when considering the Plaintiffs' Motion for Summary Judgment, the Court must give the Defendants the benefit of all conflicts in the evidence and the benefit of all reasonable inferences that might be drawn from the evidence in their favor, and when considering the Defendants' Motion, the roles are reversed.

FACTUAL AND LEGAL BACKGROUND REGARDING THE PARTIES AND THE CODE OF JUDICIAL CONDUCT

A. The Plaintiffs

1. *Indiana Right to Life, Inc.*

IRL is a non-profit corporation incorporated in the

State of Indiana. It was formed to unite individuals concerned about the sanctity of human life, to provide education regarding abortion, infanticide, and euthanasia, to promote the right to life, and to advance legislative and constitutional changes that promote the right to life. It advances these purposes by, among other things, sending questionnaires to candidates for public office, including state judicial candidates, eliciting their views on a number of legal, political, and social issues of interest to the group. IRL then publishes the candidates' views.

In 2002 and 2004, and most recently on March 22, 2008, IRL sent questionnaires to judicial candidates. The 2008 questionnaire began with the following discussion:

> In *Republican Party of Minnesota v. White* [536 U.S. 765], 122 S.Ct. 2528 [153 L.Ed.2d 694] (2002), the U.S. Supreme Court recently held unconstitutional a canon of judicial ethics that prohibited candidates for elective judicial office from announcing their views on disputed legal or political issues. The canon violated the First Amendment because it prohibited speech on the basis of content and burdened speech of political candidates[-]a category of speech at the core of First Amendment freedoms. Judicial candidates may clearly express their views on legal and political issues without fear of being sanctioned by judicial or legal ethics authorities for doing so.
>
> Indiana Right to Life, Inc., certainly recognizes that judicial candidates should maintain actual and apparent impartiality. Thus, Indi

> ana Right to Life recognizes that judicial candidates should not pledge or promise certain results in particular cases. Nevertheless, in judicial elections, voters need to know the views of judicial candidates in order to make intelligent and conscientious decisions regarding candidates' general views on the law and personal values. This questionnaire is intended to elicit candidates' views on issues of vital interest to the constituents of Indiana Right to Life without subjecting candidates answering its questions to accusations of partiality or requiring candidates to recuse themselves in the future.

(Verified Second Am. Compl., Ex. 5 at 1, DE 67-6 (bold omitted).) It posed the following nine propositions to candidates, each prefaced with some brief background or overview of the legal or political issue:

> 1. VALUE OF EARLY HUMAN LIFE.... I believe that the unborn child is biologically human and alive and that the right to life of human beings should be respected at every stage of their biological development.
>
> 2. LEGAL ABORTION....
>
> a. I believe that abortion should be permitted only to prevent the death of the mother.
>
> b. I believe that abortion should be permitted only to prevent the mother's death, in cases of incest, and in reported cases of forcible rape.
>
> c. Other (please explain)
>
> 3. FEDERAL CONSTITUTIONAL RIGHT TO ABORTION.... I believe that *Roe v. Wade* was

wrongly decided.

4. STATE CONSTITUTIONAL RIGHT TO ABORTION.... I believe that there is no provision in our current Indiana Constitution which is intended to protect a right to abortion.

5. STATE RIGHT TO ABORTION FUNDING.... I believe that *Humphreys v. Clinic for Women[, Inc.*, 796 N.E.2d 247 (Ind.2003).] was wrongly decided.

6. STATE RIGHT TO ASSISTED SUICIDE.... I believe that there is no provision of the current Indiana Constitution which is intended to protect a right to assisted suicide.

7. DISPOSITION OF HUMAN BEINGS IN VITRO.... I believe that human beings whose lives begin by in vitro fertilization or cloning and who exist outside the body of a woman are not personal property and should be treated in accord with their best interests in any dispute over their disposition.

8. WRONGFUL LIFE.... I do not believe that a person should be able to sue another because he or she was born alive with a disability rather than aborted.

9. WRONGFUL BIRTH.... I believe that *Bader v. Johnson*, 732 N.E.2d 1212 ([Ind.] 2000) was wrongly decided.

(Verified Second Am. Compl., Ex. 5 at 1-5, DE 67-6 (bold omitted).) Candidates are asked to indicate one of the following responses to each of these propositions: "agree," "disagree," "undecided," "decline," or "refuse to answer." The "decline" response is accompanied by an

asterisk with the following statement:

> By declining to answer, I assert that I would have replied to this question but for the prospect that I may be disciplined for doing so under Indiana Judicial Canon 5A(3)(d)(i) and (ii)-which provides that a judicial candidate "shall not: (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; [or] (ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." I also will not answer because doing so could subject me to mandatory recusal as a judge under Canon 3E(1), which requires "A judge [to] disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." My response would neither cause me to be biased for or against parties nor affect my ability to be open-minded with regard to any issue.

(Verified Second Am. Compl., Ex. 5 at 2-6, DE 67-6.) The abortion legality question provided respondents several blank lines to explain what they might mean by "other.

IRL received thirty-five responses from judicial candidates. Five candidates responded by letter, one of which stated that the candidate believed "responding to the survey would violate the judicial canons that are currently in place" and therefore "decline[d] to respond to [the] survey." (Verified Second Am. Compl., Ex. 6 at 2, DE 67-7.) Thirty-one of these respondents filled out

the questionnaire, and twenty-one of these declined to answer some or all of the questions. From these respondents, there were indications that a threat of discipline based upon the Code of Judicial Conduct or a prospect of violating a judicial conduct canon was a factor in their decision to decline to answer the questionnaire. Ten responded to each of the nine propositions, but IRL did not publish the responses out of a concern that these respondents would be subject to discipline under the Code or would be required to recuse themselves from cases involving issues discussed in the questionnaire.

IRL wanted to publish responses to its 2008 questionnaire of judicial candidates before the May 2008 primary election and the November 2008 general election. IRL desires to publish responses of judicial candidates to identical questionnaires in future elections.

2. ***Torrey Bauer***

Plaintiff Torrey Bauer is an attorney in Kosciusko County, Indiana. In the 2008 Republican primary race, he was a candidate for superior court judge in the Kosciusko County, but he was not nominated. Mr. Bauer completed and returned the 2008 IRL questionnaire, unaware of the Seventh Circuit's reversal of the injunction entered by Judge Allen Sharp. He did not contact the ICJQ for advice regarding whether answering the 2008 questionnaire would violate the Code. Mr. Bauer has expressed some concern that he may have violated the pre-2009 Code by completing the 2008 questionnaire and that he may therefore be subject to discipline. He has also indicated that he intends to run for judicial office in the future, that he would decline to

answer future IRL questionnaires based upon the provisions of the 2009 Code, and that he may have to recuse himself from cases in the event he wins a bid for judge.

3. ***Judge David Certo***

Judge David Certo is a superior court judge in Marion County, Indiana. In 2007, he was appointed by Governor Mitch Daniels to fill a vacancy on that court. When he accepted the appointment, he knew that the canons of judicial conduct would limit his partisan political activities. In 2008, he was a candidate for re-election to that office. When he received the 2008 IRL questionnaire, he considered providing substantive answers, but was unsure whether he was permitted to answer under the canons. He sought legal advice from Mr. James Bopp, his counsel in this case, but he did not inquire of the ICJQ whether answering the questionnaire would violated the Code. He did not answer any of the questions in the questionnaire because he thought he was prohibited from doing so by the "pledges or promises clause" and the "commits clause" of the pre-2009 Code and would be required to recuse himself from cases involving issues addressed in the questionnaire. Judge Certo has expressed that he intends to run for judicial office in the future and that he believes the 2009 Code would prohibit him answering future questionnaires.

Judge Certo, who has been active in Republican Party politics for many years, wants personally to solicit funds for his own campaign from non-attorneys and out-of-state attorneys and to solicit first-time donations from groups of young people and donors to the Republican Party to encourage financial participa-

tion in state and local Republican Party activities. He also wants to continue to participate in certain activities he has previously engaged in, such as serving as a delegate to the Indiana State Republican Convention, speaking at political club meetings on behalf of Republican judges and the Republican Party, and speaking to students on behalf of the Republican Party at events such as the Eastern Indiana Model Legislature.

B. Judicial Power and Judicial Selection in Indiana

Through Article 7, § 1 of the Indiana Constitution, the people of Indiana have vested the judicial power of the state in the judicial branch. Ind. Const. art. 7, § 1 ("The judicial power of the State shall be vested in one Supreme Court, one Court of Appeals, Circuit Courts, and such other courts as the General Assembly may establish."); *State v. Monfort,* 723 N.E.2d 407, 409 (Ind.2000). Under the Constitution, the General Assembly has the power both to create and to abolish courts, although it "cannot entirely abolish the courts whose existence is constitutionally mandated" and must not transgress the separation of powers doctrine of Article 3, § 1 of the Indiana Constitution. *Monfort,* 723 N.E.2d at 410, 411-14. The General Assembly has enacted statutes establishing and organizing courts throughout the state, including specifying qualifications for judges, setting terms of office, and providing for the selection of judges, which may occur through elections or nominating processes. *See, e.g.,* Ind.Code §§ 33-26-1-1, 33-26-2-1 to -4, 33-28-2, 33-29-1-3, & 33-33. Most judicial elections in Indiana are partisan, but some are not. As to the selection of justices of the Indiana Supreme Court and judges of the Court of Appeals, Article 7, § 10 of the Indiana Constitution

prescribes a process that involves the Indiana Judicial Nominating Commission submitting to the Governor a list of three nominees for each vacancy. Appointments to appellate courts in Indiana are to be made without regard to political affiliation. Article 7, § 11 defines the tenure of justices of the Indiana Supreme Court and judges of the Indiana Court of Appeals.

C. The Jurisdiction of the Indiana Supreme Court, the ICJQ, and the IDC

The Supreme Court of Indiana has exclusive jurisdiction in matters involving the admission of attorneys to the practice of law in Indiana, the discipline of attorneys admitted to the bar of the Indiana Supreme Court, and the discipline, removal, and retirement of all of Indiana's judicial officers. Ind. Const. art. 7, § 4 ("The Supreme Court shall have no original jurisdiction except in admission to the practice of law; discipline or disbarment of those admitted; the unauthorized practice of law; discipline, removal, and retirement of justices and judges; supervision of the exercise of jurisdiction by the other courts of the State; and issuance of writs necessary or appropriate in aid of its jurisdiction."); *In re Keller,* 792 N.E.2d 865, 867 (Ind.2003) (per curiam) (stating that Article 7, § 4 of the Indiana Constitution "vests this Court with exclusive jurisdiction in matters involving the admission and discipline of attorneys"); Ind.Code § 33-24-1-2(b)(1) (recognizing the Indiana Supreme Court's exclusive jurisdiction to admit attorneys to practice law in all courts of the state under rules and regulations as the supreme court may prescribe); Ind.Code § 33-24-3-1 (providing for the Indiana Supreme Court to "adopt and publish rules in conformity with [§] 33-24-1-2(b) specifying the terms and conditions under which the

supreme court ... exercise [s] jurisdiction"); Ind. Admission & Discipline R. 23(1) (stating that "[t]he Supreme Court has exclusive jurisdiction of all cases in which an attorney who is admitted to the bar of this Court or who practices law in this State (hereinafter referred to as 'attorney') is charged with misconduct," and providing that, for purposes of this rule, the term "attorney" includes "any and all judges of any and all courts of this State," as well as all persons who are admitted to the bar of the Indiana Supreme Court or who practice law in Indiana); Ind. Admission & Discipline R. 25(I)(A) ("Pursuant to Article 7, Section 4 of the Constitution of Indiana, the Supreme Court of Indiana ... has exclusive, original jurisdiction for the discipline, removal, and retirement of all judicial officers of this state."). The preamble to Rule 25 of the Indiana Rules for Admission to the Bar and the Discipline of Attorneys declares that "[t]he regulation of judicial conduct is critical to the integrity of the judiciary and to public confidence in the judicial system" and that "[t]he purpose of this rule is to provide a mechanism for the discipline of judicial officers of the State of Indiana." Ind. Admission & Discipline R. 25.

The ICJQ, the members of which are sued in their official capacities in this case, is an arm of the Indiana Supreme Court. The ICJQ was established by Article 7, § 9 of the Indiana Constitution, and it is authorized to receive and investigate complaints against all judicial officers of the state and to forward to the Indiana Supreme Court any recommendation for the discipline, removal, or retirement of any judicial officer of the state. Ind. Const. art. 7, § 9; Ind. Admission & Discipline R. 25(I)(B). The ICJQ has jurisdiction over conduct committed by a judicial officer and over

violations of Canon 5 of the Code (presumably now Canon 4 of the 2009 Code) committed by a candidate for judicial office,[4] and the ICJQ may refer to the IDC allegations of misconduct committed by a judicial officer while an attorney and not during his or her term in judicial office. Ind. Admission & Discipline R. 25(I)(D) & (E). The ICJQ's statutory authority is set forth in Indiana Code § 33-38-13-1 *et seq.*

Margaret Babcock served as a staff attorney to the ICJQ from 1987 to 1992, and she has served as counsel to the ICJQ since 1992. She is responsible for answering formal and informal inquiries from judges, judicial candidates, and the public regarding the Code of Judicial Conduct and for advising judicial candidates whether a proposed course of conduct would violate the judicial canons. She represents the ICJQ in enforcing the Code and helps judges and judicial candidates to act in manner consistent with the impartiality and independence of the judiciary.

The IDC, whose members are also sued here in their official capacities, is an agency of the Indiana Supreme Court, and its powers and duties are outlined in Indiana Admission and Discipline Rule 23. Ind. Admission & Discipline R. 23(6). Among other things, it has the power and duty to supervise the investigation of claims of attorney misconduct. Ind. Admission & Discipline R. 23(8). According to Indiana Admission and Discipline Rule 23, "[a]ny conduct that violates the

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[4]Rule 25 of the Indiana Rules for Admission to the Bar and the Discipline of Attorneys appears not to have been updated to reference the 2009 Code, and thus it continues to refer to Canon 5 of the pre-2009 Code.

Rules of Professional Conduct or the Code of Judicial Conduct ... or any standards or rules of legal and judicial ethics or professional responsibility ... shall constitute grounds for discipline." Ind. Admission & Discipline R. 23(2).

Ms. Babcock did not advise any judicial candidates that the canons of judicial conduct prohibited them from answering IRL's 2008 questionnaire or threatened any candidates with discipline if they did. No complaints are pending before the ICJQ related to IRL's 2002, 2004, or 2008 questionnaire (or related to any other questionnaires submitted to judicial candidates or to questionnaire answers). The ICJQ has never instituted disciplinary proceedings against judicial candidates who have answered IRL's questionnaires. Similarly, to Ms. Babcock's knowledge, the ICJQ has never investigated or prosecuted a judicial candidate or judge for answering an interest group questionnaire.

D. *Republican Party of Minnesota v. White*, the ICJQ's Advice, and *Shepard I*

In *Republican Party of Minnesota v. White*, 536 U.S. 765, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002), the Supreme Court declared that the "announce clause" of the Minnesota Code of Judicial Conduct violated the First Amendment. The announce clause at issue in that case prohibited a candidate for a judicial office, including an incumbent judge, from announcing his or her views on disputed legal or political issues. *Id.* at 768, 122 S.Ct. 2528. The Court determined that the announce clause covered "much more than promising to decide an issue in a particular way. The prohibition extends to the candidate's mere statement of his

current position, even if he does not bind himself to maintain that position after election." *Id.* at 770, 122 S.Ct. 2528. The *White* Court expressed "no view" regarding the clauses related to pledges or promises, which were not challenged in that case.[5] *Id.*

In response to the Supreme Court's decision in *White*, Ms. Babcock drafted, and the ICJQ adopted, Preliminary Advisory Opinion # 1-02.[6FN6] Prior to the 2002 general election, she distributed this advisory opinion to all judicial candidates. The opinion indicated that Indiana removed the "announce clause" from the Code of Judicial Conduct in 1993,[7] but it acknowledged that the ICJQ had, in effect, counseled judicial candidates against announcing their views on disputed social and legal issues. The opinion explained that, "in light of the *White* opinion, the Commission is compelled to acknowledge that candidates are permitted under the first amendment to state their general views about disputed social and legal issues." (Defs.' Ex. H at 2, DE

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[5]The Seventh Circuit has indicated that the "pledges or promises clauses" are "more limited provisions" than the "announce clause." *Shepard*, 507 F.3d at 546.

[6]It does not appear that the Preliminary Advisory Opinion # 1-02 has been updated or superseded since the 2009 Code was adopted. (Defs.' Ex. A at 1-2, DE 74-2 (referencing the ICJQ's advisory opinions webpage at http://www.in.gov/ judiciary/ jud-qual/opinion.html).)

[7]In 1993, the Seventh Circuit issued its decision in *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224 (7th Cir.1993), finding that the "announce clause" in the Illinois judicial conduct code violated the First Amendment.

74-9.) The ICJQ added:

> Candidates have a constitutional right to state their views on, for example, abortion or the death penalty, to characterize themselves as "conservative" or "tough on crime," or to express themselves on any number of other philosophies or perspectives. These examples are not exclusive, but are those about which candidates in Indiana most often inquire.

(*Id.*) The opinion explained that the ICJQ could not provide a list of approved and disapproved statements because "the propriety of more particularized statements is too dependent upon context and facts to allow the Commission's prejudgment in most instances" and that "many issues about campaign speech will require ad hoc analysis." (*Id.* at 2-3.) Accordingly, the ICJQ advised candidates to contact it for advice prior to making campaign statements.

The opinion warns candidates of the ease with which one can inadvertently violate the canons:

> As a judicial candidate makes more specific campaign statements relating to issues which may come before the court beyond, for example, the somewhat amorphous "tough on crime" statement, or broad statements relating to the candidate's position on disputed social and legal issues, the candidate incurs the risk of violating the "commitment" clause and/or the "promises" clause. And, even where those clauses are not violated, the candidate's statements may invite future recusal requests, or even mandate recusal on future cases; as such, they are subject to criticism both by the oppo-

> nent and by the Commission as interfering with the proper performance of the judicial duties and with the proper administration of justice.... Clearly, a statement indicating that a candidate will rule in a particular way violates the "commitment" clause and the "promises" clause. A candidate's statement must not be mutually exclusive with a pledge to be faithful to the law and to judge without partiality. A statement which appears to constitute a mere expression of fact, such as a candidate's reference to a record of imposing harsh penalties in criminal cases, may be deemed an implied promise of future conduct and, certainly, subjects the candidate to criticism for calling into question his or her ability to rule in each case on the evidence and the law, and not for the purpose of fulfilling a personal predilection. Such a statement will be looked upon by the Commission with disfavor, as it likely represents a bias against criminal defendants who later may appear before the candidate.

(*Id.* at 3.) Although some philosophical expressions may fall between an impermissible pledge and a proper statement about the best way to approach a social problem, such as the statement that "all drunk drivers should spend some time in jail," (*id.* at 3), such statement could require recusal in the ICJQ's opinion. (*Id.* at 4.) Statements of "literal fact" may even violate the canons because they are misleading, such as when a challenger criticizes an incumbent judge by stating that "hundreds of litigants are still waiting for their cases to be heard," but no regard is given to the status

of the cases when the incumbent judge presides in a busy court. (*Id.*) Such statements are inappropriate because they mislead voters into believing the judge is neglecting duties. (*Id.*) Similarly, a candidate cannot promise to "return integrity" to the bench or to "change the court to a forum where litigants will be treated with dignity" unless the statement is based on "objective and demonstrable facts about the incumbent's qualifications or record." (*Id.* at 5.)

On August 2, 2005, the Eighth Circuit issued its opinion in *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Cir.2005) (en banc). The court determined that the Minnesota partisan activities clause, which prohibited judges and judicial candidates from identifying themselves as members of political organizations, attending political gatherings, or seeking, accepting, or using endorsements from political organizations, violated the First Amendment. *Id.* at 754-63. It also decided that the Minnesota solicitation clause, which prohibited judges and judicial candidates from personally soliciting or accepting campaign contributions or personally soliciting public support, and which provided for judicial campaign committees, violated the First Amendment. *Id.* at 763-66.

As noted above, the earlier incarnation of this lawsuit (*Shepard I*) was instituted on September 29, 2004, a few years after the Supreme Court's *White* decision and the issuance of Preliminary Advisory Opinion # 1-02. On November 28, 2006, Judge Sharp granted the plaintiffs' request for injunctive relief, permanently enjoining enforcement of the "pledges or promises clause" and the "commits clause" (former Canon 5A(3)(d)(i) and (ii)), but he denied the plaintiffs'

request for a permanent injunction with respect to the "recusal requirement" (former Canon 3E(1)). *Shepard,* 463 F.Supp.2d 879. On October 26, 2007, the Seventh Circuit reversed Judge Sharp's ruling because the plaintiffs lacked standing. *Shepard,* 507 F.3d 545. The Seventh Circuit located *Shepard I* in the genre of post-*White* lawsuits that "various groups have filed ... throughout the country" challenging the pledges/commitments clauses. *Id.* at 546 (citing, as examples, *Pa. Family Inst., Inc. v. Black,* 489 F.3d 156 (3d Cir.2007), and *Alaska Right to Life Political Action Comm. v. Feldman,* 504 F.3d 840 (9th Cir.2007)).

Meanwhile, as these cases and similar cases were working their way through the federal and state courts, the American Bar Association (ABA) revised its Model Code of Judicial Conduct. (Defs.' Ex. I.) The ABA adopted this revised Model Code in February 2007.

E. The Relevant Provisions of the Pre-2009 Code and *Shepard II*

Prior to the adoption of the 2009 Code, the Code consisted of five canons and included provisions challenged in the Plaintiffs' original complaint and first amended complaint. Former Canon 3E(1), the "recusal requirement," provided that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." It was included under former Canon 3, which stated that "[a] judge shall perform the duties of judicial office impartially and diligently."

Former Canon 5A(3)(d)(i), the "pledges or promises clause," provided that candidates for judicial office shall not "make pledges or promises of conduct in office other than the faithful and impartial performance of

the duties of the office." Former Canon 5A(3)(d)(ii), the "commits clause," provided that candidates for judicial office shall not "make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." Former Canon 5A(1) prohibited a judge or a judicial candidate from (a) "act[ing] as a leader or hold[ing] office in a political organization," (b) "publicly endors[ing] or publicly oppos[ing] another candidate for office," or (c) "mak[ing] speeches on behalf of a political organization." Canons 5A(1)(a), (b), and (c) have been termed "partisan activities clauses." Former Canon 5A(1)(e) prohibited a judge or a judicial candidate from "solicit[ing] funds for, pay[ing] an assessment, slating fee or other mandatory political payment to, or mak[ing] a contribution to, a political organization or candidate, or purchas[ing] tickets for political party dinners or other functions," and former Canon 5C(2) prohibited a judicial candidate from "personally solicit[ing] or accept[ing] campaign contributions or personally solicit[ing] publicly stated support." Former Canons 5A(1)(e) and 5C(2) have collectively been referred to as the "solicitation clauses." Former Canon 5C(1) permitted judges and judicial candidates who are subject to public election to attend gatherings of political organizations, purchase tickets for such gatherings for the judge and the judge's guest, identify themselves as members of political parties, voluntarily contribute to political organizations, speak at gatherings on their own behalf, appear in media advertisements supporting their candidacies, distribute promotional campaign literature supporting their candidacies, and publicly endorse and attend gatherings for other candidates in the same public election. These

canons were included under former Canon 5, a general standard requiring that "[a] judge or judicial candidate shall refrain from inappropriate political activity."

On April 18, 2008, the Plaintiffs instituted this lawsuit (*Shepard II*). On May 6, the Court granted the Plaintiffs' request for a preliminary injunction enjoining enforcement of the "pledges or promises clause" and the "commits clause" (former Canon 5A(3)(d)(i) and (ii)) against judicial candidates who respond to the IRL's 2008 questionnaire. On June 5, the Plaintiffs filed an amended pleading in which they challenge the "pledges or promises clause" (Canon 5A(3)(d)(i)), the "commits clause" (Canon 5A(3)(d)(ii)), and the "recusal requirement" (Canon 3E(1)), as well as the "partisan activities clauses" (Canon 5A(1) (a) & (c)), the "solicitation clauses" (Canon 5A(1)(c) & 5C(2)), and Canons 5A(1)(b), 5C(1)(g), and 5C(2).

F. The Relevant Provisions of the 2009 Code

Meanwhile, the Indiana Supreme Court was in the process of revising the Indiana judicial conduct code. In September 2008, the Indiana Supreme Court announced its adoption of a substantially revised Code of Judicial Conduct that would be effective on January 1, 2009. On September 19, the Court issued its Order Amending Code of Judicial Conduct. This new Code is patterned after the 2007 Model Code of Judicial Conduct approved by the American Bar Association. (Agreed Prelim. Inj. Ex. 3.)

The 2009 Code consists of four canons and rules under each canon, as well as a preamble and sections addressing scope, terminology, and application. All provisions of the Code apply to full-time judges, but with part-time judges, not all provisions apply. Under

the Code, a judge is any person authorized to perform judicial functions within the courts of the Indiana judiciary. Canon 4 applies to judicial candidates. The Code defines "judicial candidate" as follows:

> any person, including a sitting judge, who is seeking selection for or retention in judicial office by election or appointment. A person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election or appointment authority, authorizes or, where permitted, engages in solicitation or acceptance of contributions or support, or is nominated for election or appointment to office.

Indiana Rule of Professional Conduct 8.2(b) requires lawyers who are candidates for judicial office to "comply with the applicable provisions of the Code of Judicial Conduct."

The preamble to the Code highlights some of the principles and values that have guided the Indiana Supreme Court in adopting the standards contained in the Code. It states:

> An independent, fair and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law. Inherent in all the Rules contained in this Code are

> the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.
>
> Judges should maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.

The Code of Judicial Conduct establishes standards for the ethical conduct of judges and judicial candidates. It is not intended as an exhaustive guide for the conduct of judges and judicial candidates, who are governed in their judicial and personal conduct by general ethical standards as well as by the Code. The Code is intended, however, to provide guidance and assist judges in maintaining the highest standards of judicial and personal conduct, and to provide a basis for regulating their conduct through disciplinary agencies.

Canon 1 mandates that judges "uphold and promote the independence, integrity, and impartiality of the judiciary, and ... avoid impropriety and the appearance of impropriety." The Code defines "impartial," "impartiality," and "impartially" to "mean absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge." "Independence" refers to "a judge's

freedom from influence or controls other than those established by law," and "integrity" is defined as "probity, fairness, honesty, uprightness, and soundness of character." "Impropriety" refers to "conduct that violates the law, court rules, or provisions of this Code, and conduct that undermines a judge's independence, integrity, or impartiality."

Canon 2 requires that "[a] judge shall perform the duties of judicial office impartially, competently, and diligently." Rule 2.10 of the Code addresses judicial statements on pending and impending cases. The Code defines "impending matter" as "a matter that is imminent or expected to occur in the near future," and "pending matter" as "a matter that has commenced." A pending matter "continues to be pending through any appellate process until final disposition." Rule 2.10(A) states that "[a] judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing." Rule 2.10(B) states that "[a] judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office." Rule 2.11 addresses disqualification, and Rule 2.11(A)(5) mandates the following:

> (A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

...

> (5) The judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

Canon 3 requires judges to conduct their "personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office."

Canon 4 prohibits judges and candidates for judicial office from "engaging in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary." Rule 4.1 addresses political and campaign activities of judges and judicial candidates in general, and Rule 4.1(A) provides in relevant parts as follows:

> Except as permitted by law,[8] or by Rules 4.1(B), 4.1(C), 4.2, 4.3, and 4.4, a judge or a judicial candidate shall not:
>
> (1) act as a leader in or hold an office in a political organization;[9]

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[8]The Code defines the term "law" to encompass court rules, statutes, constitutional provisions, and decisional law.

[9]The Code defines "political organization" as "a political party or other group sponsored by or affiliated with a political party or candidate, the principal purpose of which is to further the election or appointment of candidates for political office," but the term is understood to exclude a

(2) make speeches on behalf of a political organization;

(3) publicly endorse or oppose a candidate for public office;

(4) solicit funds for, pay an assessment to, or make a contribution to a political organization or a candidate for public office;[10]

...

(8) personally solicit or accept campaign contributions other than through a campaign committee authorized by Rule 4.4; [or]

...

(13) in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

Rule 4.1(B) requires judges and judicial candidates to ensure that other persons do not undertake any prohibited activities on behalf of the judge or judicial candidate. Rule 4.1(C) permits "a judge in an office filled by partisan election, a judicial candidate seeking

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judicial candidate's campaign committee created as authorized by Rule 4.4.

[10]The Code defines "contribution" as "both financial and in-kind contributions, such as goods, professional or volunteer services, advertising, and other types of assistance, which, if obtained by the recipient otherwise, would require a financial expenditure."

that office, and a judicial officer serving for a judge in office filled by partisan election" to do the following at any time:

> (1) identify himself or herself as a member of a political party;
>
> (2) voluntarily contribute to and attend meetings of political organizations; and
>
> (3) attend dinners and other events sponsored by political organizations and may purchase a ticket for such an event and a ticket for a guest.

Rule 4.2 addresses the political and campaign activities of judicial candidates in public elections, and Rule 4.3 addresses activities of candidates for appointive judicial office. Rule 4.4 provides for campaign committees to manage and conduct campaigns for candidates and sets forth certain restrictions.

The parties in this case have adopted a fairly similar set of labels and groupings of the canons and rules that the Court will modify so as not to confuse provisions of the new Code with provisions of the earlier Code. Rules 2.10(B) and 4.1(A)(13) will be referred to collectively as the Pledges, Promises, and Commitments Prohibition, and these current rules differ materially from the "pledges or promises clause" and the "commits clause" of the pre-2009 Code (former Canon 5A(3)(d)(i) & (ii)).

Rule 2.11(A)(5) will be referred to as the Prior-Commitment Recusal Requirement. Although former Canon 3E(1) appears in current Rule 2.11(A) with only a slight modification (the word "any" was substituted for the indefinite article "a" before the word "proceeding"), the 2009 Code adds in Rule 2.11(A)(5) the

recusal-requiring circumstance of a judge (while a judge or a judicial candidate) making a public statement (other than in a court proceeding, judicial decision, or opinion) that "commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy." This addition of the Prior-Commitment Recusal Requirement to the 2009 Code is a material change to the "recusal requirement" of the pre-2009 Code.

Rules 4.1(A)(1) and (2) will be referred to as the Partisan Activities Restriction. Although the 2009 Code makes some minor wording changes, Rules 4.1(A)(1) and (2) are not materially different from the "partisan activities clauses" of the pre-2009 Code (former Canon 5A(1)(a) & (c)).

Finally, Rules 4.11(A)(4) & (8) will be referred to as the Partisan Solicitation Restriction. Before the Code was amended, the Partisan Solicitation Restriction was found in former Canon 5. Although Rules 4.1(A)(4) and (8) of the 2009 Code make some minor wording changes, they are not materially different from the "solicitation clauses" in the pre-2009 Code (former Canons 5A(1)(e) & 5C(2)). Former Canon 5C(2) also provided for campaign committees to conduct campaigns for judicial candidates, which Rule 4.4 of the 2009 Code addresses.

ANALYSIS

The Plaintiffs challenge the constitutionality of the following rules in the 2009 Code: the Pledges, Promises, and Commitments Prohibition (Rules 2.10(B) and 4.1(A)(13)); the Prior-Commitment Recusal Requirement (Rule 2.11(A) & (A)(5)); the Partisan Activities Restriction (Rules 4.1(A)(1) & (2)); and the Partisan

Solicitation Restriction Rules 4.11(A)(4) & (8). They also continue to challenge former Canon 5A(3)(d)(i) and (ii) of the pre-2009 Code, and the Court will begin by addressing the claims against former Canon 5A(3)(d)(i) and (ii).

A. The Plaintiffs' Claims as to the Pre-2009 Code

The Plaintiffs claim that the "pledges or promises clause" and the "commits clause" of former Canon 5A(3)(d)(i) and (ii) are unconstitutional both facially and as applied to the questionnaire. Despite the fact that the Indiana Supreme Court has adopted a new Code that supersedes and replaces the old Code, the Plaintiffs argue that the issues related to these pre-2009 Code provisions are not moot. They urge that the collateral consequence of possible judicial discipline for speech engaged in under the protection of this Court's preliminary injunction persists and that the possibility of enforcement of these clauses "is a reasonable and real concern." (Pls.' Mem. in Supp. 12.) For these reasons, they request that the Court enter a permanent injunction barring enforcement of the clauses, "unless the [ICJQ] is willing to agree that it will not enforce the former commits clause against Plaintiffs Certo and Bauer or against others who similarly responded under protection of the preliminary injunction." (Pls.' Mem. in Supp. 12.)

The Defendants argue that the Plaintiffs' claims regarding former Canon 5A(3)(d)(i) and (ii) are moot. In addition to noting that the Plaintiffs have received the remedy they sought regarding these former Code provisions, which are no longer in effect, the Defendants state that the ICJQ will only enforce the canons in light of the Supreme Court's *White* decision and that

the ICJQ "has never enforced" the former "pledges or promises" clause, the former "commits clause," or the current Pledges, Promises, and Commitments Prohibition "against anyone who has answered the questionnaire despite having multiple opportunities to do so." (Defs.' Mem. in Opposition 4; *see also* Defs.' Mem. in Supp. 12.) In making this argument, the Defendants reference Preliminary Advisory Opinion # 1-02, which states that "candidates are permitted under the first amendment to state their general views about disputed social and legal issues" and "have a constitutional right to state their views on, for example, abortion or the death penalty, to characterize themselves as 'conservative' or 'tough on crime,' or to express themselves on any number of other philosophies or perspectives." (Defs.' Ex. H at 2, DE 74-9.) Quoting the Seventh Circuit's opinion in *Shepard*, 507 F.3d at 550, they urge that there is "no evidence of a real threat of enforcement" against those who completed IRL's 2008 questionnaire. Additionally, the Defendants contend that this Court's preliminary injunction and its ruling that the former canons no longer have legal effect combine to make enforcement even less likely, that the ICJQ "is no longer defending any of its former Canons," and that their defense of the new Code is not "any sly intent to enable enforcement of the older Canons against the Plaintiffs." (Defs.' Reply Mem. 3-4.)

The Court has an ongoing obligation to determine whether it has jurisdiction to hear the Plaintiffs' claims, including those related to the pre-2009 Code. *See State of Ill. v. City of Chi.*, 137 F.3d 474, 479 (7th Cir.1998) ("[A] court is not free to decide the merits when there is no justiciable controversy. Subject-matter jurisdiction is the first question in every case,

and if the court concludes that it lacks jurisdiction it must proceed no further."). The Supreme Court has instructed that "Article III of the Constitution limits the judicial power of the United States to the resolution of 'Cases' and 'Controversies,' and 'Article III standing ... enforces the Constitution's case-or-controversy requirement.' " *Hein v. Freedom from Religion Foundation, Inc.*, 551 U.S. 587, 597, 127 S.Ct. 2553, 2562, 168 L.Ed.2d 424 (2007) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006) (internal quotation marks omitted)). In *Flast v. Cohen*, the Supreme Court explained some of the deeper meaning of the case-and-controversy doctrine:

> Embodied in the words "cases" and "controversies" are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-and-controversy doctrine.

Id., 392 U.S. 83, 94-95, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). Under established standing doctrine, "the party invoking the court's authority [must] demonstrate a 'personal injury fairly traceable to the defendant's

allegedly unlawful conduct and likely to be redressed by the requested relief.' " *Laskowski v. Spellings*, 546 F.3d 822, 825 (7th Cir.2008) (quoting *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984)).

When subsequent developments in a case render an issue or question to be adjudicated in a case moot, a question arises as to whether a justiciable controversy remains present in the case. Indeed, mootness is "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Friends of the Earth, Inc. v. Laidlaw Evtl. Servs., Inc.*, 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (internal quotations and citations omitted). As a consequence, "[w]hen the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome, the case is (or the claims are) moot and must be dismissed for lack of jurisdiction." *St. John's United Church of Christ v. City of Chi.*, 502 F.3d 616, 626 (7th Cir.2006) (internal quotations and citations omitted).

The Court finds that the Plaintiffs' remaining claims related to the pre-2009 Code (the "pledges or promises clause" and the "commits clause" of former Canon 5A(3)(d)(i) and (ii)) have become moot, based upon the Indiana Supreme Court's adoption of the 2009 Code. The new Code includes a Pledges, Promises, and Commitments Prohibition (Rules 2.10(B) and 4.1(A)(13)) that differs materially from and has narrower language than the former "pledges or promises clause" and the former "commits clause." Thus, even

though the Plaintiffs were at one point entitled to pursue claims as to the pre-2009 Code, and even though the Plaintiffs did in fact receive from the Court some of the relief they sought as to the former "pledges or promises clause" and the former "commits clause," the dispute regarding these two provisions of the old Code no longer rages.

In finding these claims moot, the Court finds persuasive the Tenth Circuit's recent decision in *Kansas Judicial Review v. Stout,* 562 F.3d 1240 (10th Cir.2009), which the parties in this case have cited in their submissions. The court in *Stout* confronted a very similar situation to the one the Court encounters here. While the *Stout* case was pending before the Tenth Circuit, the Kansas Supreme Court adopted a new judicial conduct code that significantly revised the "pledges or promises" and "commits" clauses and eliminated another clause. Although the district court had entered a preliminary injunction enjoining enforcement of these clauses under the old code and although the matter was pending before the Tenth Circuit, the *Stout* court determined that the plaintiffs' challenges to the superseded and replaced canons were moot. *Id.* at 1246. In so finding, the court noted the general rule that "repeal of a challenged statute causes a case to become moot because it extinguishes the plaintiff's legally cognizable interest in the outcome, rendering any remedial action by the court ineffectual." *Id.* at 1246. The Seventh Circuit has similarly stated that "any dispute over the constitutionality of a statute becomes moot if a new statute is enacted in its place during the pendency of the litigation, and the plaintiff seeks only prospective relief." *Zessar v. Keith,* 536 F.3d 788, 793 (7th Cir.2008). In this case, the Plaintiffs

have sought declaratory and injunctive relief and no damages, and thus their claims related to the former canons are moot.

The Court also finds persuasive the Tenth Circuit's treatment of the collateral consequence doctrine in *Stout*. The Tenth Circuit explained that, under the doctrine, when a secondary or collateral injury remains despite the resolution of the plaintiff's primary claim, the case is not moot, but that the case is moot "if no consequences can be foreseen or if foreseeable possible consequences seem remote." *Stout*, 562 F.3d at 1248 (internal quotations and citations omitted). Like the *Stout* court, the Court finds that the Plaintiffs' allegations of possible collateral consequences are speculative and remote and that disciplinary action under the former "pledges or promises clause" and the former "commits clause" against judges and judicial candidates who completed the 2008 IRL questionnaire is not foreseeable.[11] The Court notes that counsel for the

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[11]The Court is mindful of the exception to mootness articulated by the Seventh Circuit in *Zessar*. The court there noted that amendment or repeal of a challenged statute does not deprive a court of its power to decide a claim or a case if it is not absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. *Id.*, 536 F.3d at 794. Because the lead Defendant in this action is a public official and because the rule-making body is the Indiana Supreme Court, which is comprised of public officials, the Court places "great[ ] stock in their acts of self-correction," and the Court has no reason to doubt their or their counsels' genuineness. *See id.* Thus, the Court has assurance that the challenged conduct under the old Code has ceased.

Defendants on October 7, 2008, repeatedly represented to the Court that, after January 1, 2009, the former Code will no longer be in effect. (Tr. 11-12.) Of course, the former Code referenced by counsel included the former "pledges or promises clause" and the former "commits clause," which were the subject of this Court's preliminary injunction. Additionally, the Court understands the sum total of the Defendants' representations to the Court (coupled with the Indiana Supreme Court's adoption of the 2009 Code with materially different provisions) to constitute an acknowledgment that the Defendants will not enforce the former "pledges or promises clause" or the former "commits clause" against any respondent to the IRL 2008 questionnaire.

For these reasons, the Court will dismiss Counts I and II (the Plaintiffs' claims challenging the "pledges or promises clause" and the "commits clause" of former Canon 5A(3)(d)(i) and (ii)). The Court will also vacate the preliminary injunction entered on May 6, 2008, 2008 WL 1994868, enjoining enforcement of the "pledges or promises clause" and the "commits clause" (Canon 5A(3)(d)(i) and (ii)) against judicial candidates who respond to the IRL's 2008 questionnaire.

B. The Plaintiffs' Claims as to the 2009 Code

The Plaintiffs have asserted the following claims: the Pledges, Promises, and Commitments Prohibition (Rules 2.10(B) & 4.1(A)(13)) is unconstitutional on its face and as applied to the questionnaire; the Prior-Commitment Recusal Requirement (Rules 2.11(A) & (A)(5)) is unconstitutional; the Partisan Activities Restriction (Rules 4.1(A)(1) & (2)) is unconstitutional on its face and as applied to Judge Certo; and the

Partisan Solicitation Restriction (Rules 4.11(A)(4) & (8)) is unconstitutional on its face and as applied to Judge Certo. The Defendants oppose these claims on an array of grounds, including justiciability, which the Court must address first.

1. ***The Justiciability Issues***

Before the Court can approach the merits of the Plaintiffs' claims challenging the 2009 Code provisions, the Court must revisit justiciability because the 2008 election season has passed and because the new Code is now in effect. Justiciability requires, among other things, that the case or controversy be brought by parties with a sufficiently personal stake in the outcome (parties with "standing"), *see Allen*, 468 U.S. at 750, 104 S.Ct. 3315, and not be contingent upon future events that may not occur as anticipated or at all (a case that is "ripe"), *see Texas v. United States*, 523 U.S. 296, 300, 118 S.Ct. 1257, 140 L.Ed.2d 406 (1998).

The requirement that plaintiffs have standing to bring a case entails both constitutional and prudential limitations on the exercise of federal jurisdiction. As for the constitutional component, Article III requires that, at a minimum, plaintiffs make the following three showings:

> First, the plaintiff must have suffered an injury in fact-an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be fairly traceable to the challenged action of the defendant, and not the result of independent

> action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (internal citations, quotations, ellipses, and brackets omitted). The requirement that the injury be particularized means that "the injury must affect the plaintiff in a personal and individual way." *Id.* at 560 n. 1, 112 S.Ct. 2130. The party invoking federal jurisdiction bears both the burden of production and persuasion as to all these elements. *See id.* at 561, 112 S.Ct. 2130.

In addition to these constitutional requirements, plaintiffs must meet prudential standing requirements, "judicially self-imposed limits on the exercise of federal jurisdiction." *Allen*, 468 U.S. at 751, 104 S.Ct. 3315. The prudential standing requirements have not been exhaustively defined, *see Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004), but they encompass "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Allen*, 468 U.S. at 751, 104 S.Ct. 3315. As for the prohibition on raising another's rights, in the context of the First Amendment, there are "other concerns that justify a lessening of prudential limitations on standing." *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984).

"Ripeness is a justiciability doctrine designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.'" *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808, 123 S.Ct. 2026, 155 L.Ed.2d 1017 (2003) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967)). Ripeness is related to standing in that "if a threatened injury is sufficiently 'imminent' to establish standing, the constitutional requirements of the ripeness doctrine will necessarily be satisfied." *Nat'l Treasury Employees Union v. United States*, 101 F.3d 1423, 1428 (D.C.Cir.1996). "The difference between an abstract question calling for an advisory opinion and a ripe 'case or controversy' is one of degree, not discernible by any precise test." *Wis.'s Envtl. Decade, Inc. v. State Bar of Wis.*, 747 F.2d 407, 410 (7th Cir.1984) (citing *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 297, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979)).

"A plaintiff who mounts a pre-enforcement challenge to a statute that he claims violates his freedom of speech need not show that the authorities have threatened to prosecute him; the threat is latent in the existence of the statute." *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir.2003) (internal citations omitted). To demonstrate ripeness in a pre-enforcement challenge, a plaintiff must show that the issues are fit for judicial decision and that the plaintiff will suffer a hardship if the court withholds consideration. *See Metro. Milwaukee Ass'n of Commerce v. Milwaukee County*, 325 F.3d 879, 882 (2003). Hardship is established if (1) enforcement is certain, only delayed, or, (2) even if the enforcement is not certain, the mere threat of future

enforcement has a present concrete effect and a later challenge will cause irremediably adverse consequences. *Id.*

a. *IRL's, Judge Certo's, and Torrey Bauer's Standing as to and the Ripeness of Claims Challenging the Pledges, Promises, and Commitments Prohibition and the Prior-Commitment Recusal Requirement*

Because IRL is not subject to the 2009 Code, its First Amendment claims are based on a "right-to-listen" theory. In order for there to be First Amendment protection, there must be a willing speaker. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). "[W]here a speaker exists ... the protection is afforded ... to the communication, to its source and to its recipients both." *Id.* Based upon a review of the Plaintiffs' Verified Second Amendment Complaint and the parties' submissions, this theory is applicable only to IRL's claims against the Pledges, Promises, and Commitments Prohibition (Rules 2.10(B) & 4.1(A)(13)) and the Prior-Commitment Recusal Requirement (Rules 2.11(A) & (A)(5)), and not the Partisan Activities Restriction (Rules 4.1(A)(1) & (2)) or the Partisan Solicitation Restriction (Rules 4.11(A)(4) & (8)).[12]

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[12]The Verified Second Amended Complaint is not perfectly clear regarding which Plaintiffs are pursuing which claims. From the Court's review of the Verified Second Amended Complaint and the parties' submissions, it does not appear that Plaintiffs IRL and Bauer join Plaintiff Certo's claims related to the Partisan Activities Restriction (Rules 4.1(A)(1) & (2)) and the Partisan Solicita-

In the previous suit (*Shepard I*) that IRL brought in this district, IRL advanced a right-to-listen theory, but IRL lacked sufficient evidence of a judicial candidate who wished to answer its questionnaire but did not do so because of the judicial conduct canons. The Seventh Circuit explained that, "[i]n a right-to-listen case, [IRL] would have standing if there are otherwise willing speakers who are constrained by the Judicial Code."[13] *Shepard*, 507 F.3d at 549.

In its May 6, 2008, Opinion and Order, the Court discussed at length the standing of the Plaintiffs, and the Court need not repeat that exhaustive analysis here. It is sufficient to note that IRL is joined by Plaintiffs Certo and Bauer, two willing speakers who

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tion Restriction (Rules 4.11(A)(4) & (8)). In any event, even if the Plaintiffs' Verified Second Amended Complaint were construed so that Plaintiffs IRL and Bauer were understood to assert challenges to the Partisan Activities Restriction and the Partisan Solicitation Restriction, IRL would lack standing to bring such claims and would have to be dismissed, and Plaintiff Bauer has not made out a case for his standing on those claims.

[13]The Seventh Circuit also stated that, "[i]f there is no willing speaker, or if no speaker has been subjected to sanctions based on the Code, [IRL] does not have standing." *Shepard*, 507 F.3d at 549. Although this statement may create some ambiguity, it appears from the context that the Seventh Circuit was stating what it later restated in the following: "what [the *Buckley*] case had and the [*Shepard*] case lacks are plaintiffs who wanted to speak but felt constrained not to because of the Judicial Code or who were being disciplined for speaking out in violation of the Code." *Id.*

would like to complete IRL's questionnaire without facing discipline under the provisions of the Code that regulate the speech of judicial candidates. Plaintiffs Certo and Bauer were judicial candidates when this lawsuit was instituted. Plaintiff Certo did not complete IRL's 2008 questionnaire because he believed he was prohibited from doing so by the pre-2009 Code. Plaintiff Bauer completed and returned IRL's 2008 questionnaire and has expressed concern about having possibly violated the pre-2009 Code by answering the questionnaire. Of course, the 2008 election cycle has now passed, and a new Code has been adopted. Nevertheless, Plaintiff Certo, presently a superior court judge, and Plaintiff Bauer, presently an attorney, have both attested to their intention to run for judicial office in future elections. Both have manifested a desire to discuss issues addressed in IRL's questionnaire. However, both have also attested to their concern that the 2009 Code prohibits them from answering IRL questionnaires in the future, subject them to discipline, and require recusal. There is no dispute that the 2009 Code is now in effect and would apply to Plaintiffs Certo and Bauer in the event they were to run for judicial offices in future elections, and that the First Amendment protects the political speech of judges and judicial candidates. Additionally, IRL has sent out questionnaires in 2002, 2004, and 2008, and it has indicated that it desires to send out and publish the results of such questionnaires in future elections. Furthermore, the Indiana Supreme Court (together with the ICJQ and the IDC) have the authority to investigate alleged violations of the 2009 Code and the Indiana Rules of Professional Conduct and to impose sanctions on judges, judicial candidates, and attorneys

who violate the canons and rules.

The question of the Plaintiffs' standing as to the Pledges, Promises, and Commitments Prohibition and the Prior-Commitment Recusal Requirement is similar to the standing issue addressed by the Seventh Circuit in *Buckley,* 997 F.2d 224, although *Buckley* was not a right-to-listen case. The *Buckley* court noted that the two judicial candidates in that case were likely to run again for judicial office and that the challenged law "would affect future elections."[14] [FN14]*Id.* at 226. The court observed that a "further consideration" in support of their standing was "the brevity of judicial campaigns in relation to the leisureliness of litigation, which prevented the appeals in th[o]se two cases from being decided before [the] retention campaign." *Id.*

For these reasons, the Court finds (as it did previously) that IRL has remedied the standing problem identified by the Seventh Circuit in *Shepard I* and that the Plaintiffs have demonstrated a concrete, particular, and actual injury traceable to the 2009 Code and the Defendants' conduct, and thus that they have standing to challenge the Pledges, Promises, and Commitments Prohibition and the Prior-Commitment Recusal Requirement in the 2009 Code. The Court also finds that these claims are ripe for the Court's review.

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[14]The Seventh Circuit also noted that the membership of the Illinois Judges Association, another plaintiff in that case, included many judges who would be running either for retention or higher judicial office, and that there was associational standing. *Id.* at 226-27.

b. Judge Certo's Standing as to and the Ripeness of Claims Challenging the Partisan Activities Restriction and the Partisan Solicitation Restriction

Because Plaintiff Certo is presently a superior court judge, the 2009 Code governs his conduct. He has attested that he wants to solicit funds personally for his own campaign and to solicit first-time donations to the Republican Party to encourage financial participation in state and local Republican Party activities. He has also stated that he wants to participate in other partisan activities such as serving as a delegate to the Indiana State Republican Convention and speaking on behalf of the Republican Party and Republican judges. There is no dispute that the Code is in effect and would regulate this conduct in which Judge Certo would like to engage, and that the Indiana Supreme Court (together with the ICJQ) has the authority to investigate alleged violations of the 2009 Code and to impose sanctions on judges and judicial candidates who violate the canons and rules. For these reasons, the Court finds that Plaintiff Certo has demonstrated a concrete, particular, and actual injury traceable to the 2009 Code and the Defendants' conduct, and thus that he has standing to challenge the Partisan Activities Restriction and the Partisan Solicitation Restriction. The Court also finds that these claims are ripe for review.

2. The Constitutional Claims

The central issue in this case, the application of First Amendment standards to the challenged rules governing judicial conduct, is well-suited for judicial decision. However, before analyzing the Plaintiffs' specific claims, the Court must identify the various

interests at stake.

a. *The Interests at Issue*

In this case, the free speech and association rights of judges and judicial candidates, which are protected by the First Amendment, bump into the interests of the people of Indiana in having a judiciary that is independent, fair, impartial, and competent, that is composed of individuals of integrity, and that preserves the principles of justice and the rule of law. *See Family Trust Found. of Ky., Inc. v. Wolnitzek*, 345 F.Supp.2d 672, 694 (E.D.Ky.2004) ("This case represents a perplexing intersection of an important state interest and a fundamental constitutional right: the interests of the state to ensure impartiality in the judiciary and the First Amendment rights of judicial candidates to express their opinions on legal issues, as well as the rights of voters to hear such information.").

(1) The Interests Protected by the First Amendment

The First Amendment commands that "Congress shall make no law ... abridging the freedom of speech." U.S. Const. amend. I. Freedom of association is inherently a part of those liberties protected by the First Amendment. *Buckley v. Valeo*, 424 U.S. 1, 15, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) ("The First Amendment protects political association as well as political expression."). The Supreme Court has declared:

> An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed .... Consequently, we have long understood as implicit in

> the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.

Roberts v. United States Jaycees, 468 U.S. 609, 622, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984) (citation omitted). The due process clause of the Fourteenth Amendment makes the First Amendment applicable to the states, and thus the First Amendment prohibits state government from abridging these freedoms as well as Congress. *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 336 n. 1, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995).

The Supreme Court has instructed that " 'the constitutional guarantee [of the freedom of speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office.' " *Buckley,* 424 U.S. at 15, 96 S.Ct. 612 (quoting *Monitor Patriot Co. v. Roy,* 401 U.S. 265, 272, 91 S.Ct. 621, 28 L.Ed.2d 35 (1971)). The constitutional form of government found in the United States was "borne of the great struggle to secure such freedoms as political speech," and "such freedom helps [to][en]sure the continuance of that constitutional government." *White,* 416 F.3d at 748. Thus, "[i]n a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." *Buckley,* 424 U.S. at 14-15, 96 S.Ct. 612.

Political speech is speech at the core of the First Amendment, and it is highly protected. *White,* 416 F.3d at 749. Although political speech is not beyond all

restraint, courts apply the strict scrutiny test to any regulation that would curtail it. *McIntyre,* 514 U.S. at 347, 115 S.Ct. 1511. This test requires a showing that the law that burdens the protected right advances a compelling state interest and is narrowly tailored to serve that interest. *Eu v. San Francisco County Democratic Cent. Comm.,* 489 U.S. 214, 222, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989); *United States v. Playboy Entm't Group, Inc.,* 529 U.S. 803, 816, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."). Because the strict scrutiny test is an exacting inquiry, "it is the rare case in which ... a law survives strict scrutiny." *Burson v. Freeman,* 504 U.S. 191, 211, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992).

In general, the strict scrutiny test is something of "an end-and-means test that asks whether the state's purported interest is important enough to justify the restriction it has placed on the speech in question in pursuit of that interest." *White,* 416 F.3d at 750. The test requires clarity regarding the state's interest. *White,* 536 U.S. at 775, 122 S.Ct. 2528 ("Clarity on this point is essential before we can decide whether [the purported interest] is indeed a compelling state interest ...."). The Eighth Circuit has explained how such an end-and-means test works:

> The inquiry into whether the interest (the end) is "important enough"-that is, sufficiently compelling to abridge core constitutional rights-is informed by an examination of the regulation (the means) purportedly addressing that end. A clear indicator of the degree to

> which an interest is "compelling" is the tightness of the fit between the regulation and the purported interest: where the regulation fails to address significant influences that impact the purported interest, it usually flushes out the fact that the interest does not rise to the level of being "compelling." If an interest is *compelling* enough to justify abridging core constitutional rights, a state will enact regulations that substantially protect that interest from similarly significant threats. As expressed in *White:* " '[A] law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon ... speech, when it leaves appreciable damage to that supposedly vital interest unprohibited.' "

White, 416 F.3d at 750 (quoting *White,* 536 U.S. at 780, 122 S.Ct. 2528 (quoting *The Florida Star v. B.J.F.,* 491 U.S. 524, 541-42, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989) (Scalia, J., concurring))). When a state interest is sufficiently compelling, the regulation addressing that interest must be narrowly tailored to serve that interest. *Eu,* 489 U.S. at 222, 109 S.Ct. 1013. The Eight Circuit has explained the application of the narrowly tailored standard in the following:

> As with the compelling interest determination, whether a regulation is narrowly tailored is evidenced by factors of relatedness between the regulation and the stated governmental interest. A narrowly tailored regulation is one that actually advances the state's interest (is necessary), does not sweep too broadly (is not overinclusive), does not leave significant influ-

> ences bearing on the interest unregulated (is not underinclusive), and could be replaced by no other regulation that could advance the interest as well with less infringement of speech (is the least-restrictive alternative).

White, 416 F.3d at 751 (citing cases).

Although the parties disagree regarding the constitutionality of the challenged rules governing judicial conduct, they seem to agree that the strict scrutiny standard applies because the regulations at issue restrict political speech.

(2) The Interests Served by the 2009 Code

As noted above, the people of Indiana, through the Indiana Constitution and through their representatives, have expressed their will that the judicial power of Indiana be vested in the Indiana judiciary and that Indiana's judges be selected through several different processes, including appointment from among nominees recommended by a commission, retention elections, and partisan and nonpartisan elections. The people have also assigned to the Indiana Supreme Court the authority to regulate the conduct of attorneys, judges, and judicial candidates, and the Indiana Supreme Court has exercised that authority by, among other things, adopting the Indiana Rules of Professional Conduct and the Indiana Code of Judicial Conduct.

The 2009 Code makes clear the interests it is designed to serve. The preamble to the Code begins by emphasizing that "[a]n independent, fair and impartial judiciary is indispensable to our system of justice." It continues: "The United States legal system is based upon the principle that an independent, impartial, and

competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society." In addition to highlighting the central role that the judiciary plays "in preserving the principles of justice and the rule of law," it explains that the rules in the Code have inherent within them the "precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system." Because the Code emphasizes a blend of interests that includes the fairness, impartiality, independence, integrity, and competence of the judiciary, as well as the principles of justice, and the rule of law, it seems a mistake to isolate particular interests in evaluating the constitutionality of particular rules.

The Indiana Supreme Court has linked the regulation of judicial conduct to the rights that are safeguarded in Article I, § 12 of the Indiana Constitution. This provision declares: "All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay." The court has explained that this state constitutional provision requires it to " 'construe and apply its rules governing the conduct of courts in such a manner as to be consistent with this provision so as to maintain the courts open for the administration of justice.' " *Tri Lakes Reg'l Sewer Dist. v. Geiger*, 830 N.E.2d 890, 891 (Ind.2005) (per curiam) (applying former Canon 3E and quoting *In re Appointment of a Special Judge in Wabash Circuit Court*, 500 N.E.2d 751, 752-53 (Ind.1986)). Although the *Geiger* and *In re Appointment* cases posed specific questions

related to the Code's disqualification or recusal requirement, the court's reasoning and reliance on Article I, § 12 suggests a broader application to the various canons and rules of the Code.

Of course, the interests served by the Code and this provision of the Indiana Constitution are not of recent vintage. The Indiana Supreme Court has linked values reflected in Article I, § 12 to the Magna Carta and the sorts of mischief that occurred in English courts, such as fines imposed or money paid to expedite or delay court proceedings, to procure favor, or to obtain justice and one's rightful due so that the king " 'seemed to sell justice and right to some and to delay or deny it to others.' " *State ex rel. Bd. of County Comm'rs v. Laramore,* 175 Ind. 478, 94 N.E. 761, 763 (1911) (quoting *Perce v. Hallett,* 13 R.I. 363, 1881 WL 4157, at *1 (R.I. 1881)); *see also id.* ("This provision of our Constitution, while getting its substance, as similar provisions in other states Constitutions do, from Magna Charta, it may be, is a broader guaranty of free, unpurchased, and impartial justice than that the similar provision in that great instrument sought to establish."). *See also Smith v. Ind. Dep't of Corr.,* 883 N.E.2d 802, 806-08 (Ind.2008) (tracing the history of this provision back through the 1816 Indiana Constitution and Sir Edward Coke's *Second Institute* to the Magna Carta). In a recent opinion interpreting Article I, § 12, the court stated:

> We think this [review of the history of this provision] demonstrates an embracing of the notion, well accepted by 1851 [when the current Indiana Constitution was ratified], of an independent judiciary, and guarantees access

> to the courts to redress injuries to the extent the substantive law recognizes an actionable wrong. As such, the first sentence [of § 12] imposes some limitations on the actions of the legislative and executive branches. The second sentence addresses the values of speed and impartiality and is ... "aimed at the judiciary, not the legislature."

Id. at 807 (quoting *Meech v. Hillhaven West, Inc.*, 238 Mont. 21, 776 P.2d 488, 493 (1989)).

The Supreme Court of the United States, in its recent decision in *Caperton v. A.T. Massey Coal Co.*, --- U.S. ----, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009), determined that the federal due process rights of parties in a state case were violated when a state appellate judge failed to recuse himself from participating in the case, even though the judge in his election campaign for that judicial office received substantial financial support from a corporation that would later prevail in an appeal in which the judge participated. After noting that "a basic requirement of due process" is a "fair trial in a fair tribunal," the Court observed that "most matters involving judicial disqualification [do] not rise to a constitutional level," but would generally be matters of legislative discretion regulated by statutes and judicial codes. *Id.* at 2259 (quotations and citations omitted). In discussing *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927), in which the Court had addressed the disqualification of a mayor-judge based upon his financial interest in the outcome of a case, the Court highlighted its concern "with a more general concept of interests that tempt adjudicators to disregard neutral-

ity" and reiterated the "controlling principle" of its decision in *Tumey:*

> "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law."

Caperton, 129 S.Ct. at 2260 (quoting *Tumey,* 273 U.S. at 532, 47 S.Ct. 437). After observing that it is not possible to define "with precision" the degree or kind of interest that would warrant disqualification under this possible "temptation" standard, the Court explained that the test is to "have an objective component." *Id.* at 2261. In discussing *In re Murchison,* 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955), in which the Court had addressed the disqualification of a judge who had convicted two defendants for perjury and criminal contempt based upon their conduct in earlier proceedings before that judge, the Court repeated its observation in *Murchison* that "the disqualifying criteria 'cannot be defined with precision. Circumstances and relationships must be considered.'" *Caperton,* 129 S.Ct. at 2261 (quoting *Murchison,* 349 U.S. at 136, 75 S.Ct. 623). According to the Court, the objective inquiry required is "whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Id.* at 2262. Additionally, after recognizing that "fairness and disinterest and neutrality are among the factors at work" in a judge reaching a particular judgment in a case, the Court emphasized the challenge of inquiring into a judge's

potential bias:

> The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules. Otherwise there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case. The judge's own inquiry into actual bias, then, is not one that the law can easily superintend or review, though actual bias, if disclosed, no doubt would be grounds for appropriate relief. In lieu of exclusive reliance on that personal inquiry, or on appellate review of the judge's determination respecting actual bias, the Due Process Clause has been implemented by objective standards that do not require proof of actual bias.

Id. at 2263 (citing cases).

Although the parties disagree about what bearing the Supreme Court's decision in *Caperton* should have on this Court's ruling in this case-(the Supreme Court did after all repeatedly note the exceptional, extraordinary, and extreme facts of that case)-*Caperton* does illustrate that judicial elections and judicial conduct (including the issue of recusal) can have important due process of law implications. Additionally, the *Caperton* Court noted that the state codes of judicial conduct "serve to maintain the integrity of the judiciary and the rule of law," and it quoted approvingly the following statement from the *amicus curiae* brief filed by the Conference of Chief Justices: "the codes are '[t]he principal safeguard against judicial campaign abuses'

that threaten to imperil 'public confidence in the fairness and integrity of the nation's elected judges.' " *Caperton,* 129 S.Ct. at 2266 (quoting *amicus curiae* brief). For the Court, a state's interest in judicial integrity is "vital" and "of the highest order":

> "Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order."

Id. at 2266-67 (quoting *White,* 536 U.S. at 793, 122 S.Ct. 2528) (Kennedy, J., concurring). The Court concluded by observing that states may impose standards for judicial disqualification that are more rigorous than are required by federal due process protections, that state "codes of judicial conduct provide more protection [of judicial integrity] than due process requires," and that most disputes over disqualification will be resolved under state judicial conduct codes. *Id.* at 2267. It should also be noted that, although Chief Justice Roberts, who was joined by three other justices, wrote a strong dissenting opinion, he did state that he shared "the majority's sincere concerns about the need to maintain a fair, independent, and impartial judiciary-and one that appears to be such." *Id.*

"Due process"-type concerns are also at play in Article I, § 12 of the Indiana Constitution. The Indiana Supreme Court has declared that Article I, § 12 "has

multiple strains, but they are not the same as the federal pair [involving due process]." *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 975 (Ind.2000). Nevertheless, the Indiana clause requiring a "remedy by due course of law" for injuries to "person, property, or reputation" "prescribes procedural fairness" in the civil context. *Id.* Thus, the court has instructed that, in the context of "a procedural right to 'remedy by due course of law' in a civil proceeding," "the Indiana Constitution has developed a body of law essentially identical to federal due process," but that, in the context of "state criminal procedural doctrines," protections have "almost uniformly developed, not by reference to Article I, Section 12, but rather under the various other more specific provisions that make up our state Constitution's counterpart to the Bill of Rights." *Id.* at 976. *Accord Sanchez v. State,* 749 N.E.2d 509, 514 (Ind.2001) (discussing the applicability of Article I, § 12 in the civil and criminal contexts); *see also Doe v. O'Connor,* 790 N.E.2d 985, 988 (Ind.2003) ("[W]e will employ the same methodology when analyzing a claimed denial of procedural due process violation of the Due Course of Law Clause of Art. I, § 12, as the Supreme Court [h]as used to analyze claimed violations of the Due Process Clause.") (citing cases); *Sanchez,* 749 N.E.2d at 515 ("[F]undamental fairness in judicial proceedings is assumed and required by our constitution. The common law has long been a basic building block in Indiana law.... [T]he references [in Indiana cases to a federal and state constitutional requirement of due process] reflect the common understanding that courts of this state are constitutionally bound by the basic concepts of fairness that are frequently identified with 'due process' in the federal

constitution.").

This review of the interests at stake shows that the interests put forward by both sides are of the highest importance in our system of government. Judges and judicial candidates have a compelling interest in free speech and association, and the people of Indiana and the Indiana Supreme Court have compelling interests in the principles of justice, the rule of law, and a judiciary characterized by fairness, impartiality, independence, integrity, and competence. As a consequence, the Indiana Supreme Court must carefully balance the various values and interests at stake and narrowly tailor the rules governing the conduct of judges and judicial candidates to serve these interests. *Cf. White,* 536 U.S. at 821, 122 S.Ct. 2528 (Ginsburg, J., dissenting) ("For more than three-quarters of a century, States like Minnesota have endeavored, through experiment tested by experience, to balance the constitutional interests in judicial integrity and free expression within the unique setting of an elected judiciary."); *Buckley,* 997 F.2d at 231 ("[T]he principle of impartial justice under law is strong enough to entitle government to restrict the freedom of speech of participants in the judicial process, including candidates for judicial office, but not so strong as to place that process completely outside the scope of the constitutional guaranty of freedom of speech."). The question that the Court must now decide is whether the current regulations permissibly restrict political speech under the strict scrutiny standard.

b. *The Rules at Issue*

The Indiana Supreme Court, in response to decisions by the United States Supreme Court and other

federal courts determining the constitutionality of provisions governing judicial conduct, has repeatedly adjusted the applicable rules and the advice given to lawyers, judges, and judicial candidates regarding permissible conduct. As it has responded to these decisions and made necessary adjustments, the Indiana Supreme Court has balanced the various values and interests at stake.

(1) *The Pledges, Promises, and Commitments Prohibition*

Compared to the "pledges or promises clause" and the "commits clause" of the pre-2009 Code (former Canon 5A(3)(d)(i) & (ii)), the Pledges, Promises, and Commitments Prohibition (Rules 2.10(B) and 4.1(A)(13) of the 2009 Code) is a substantially narrower restriction of political speech by judges and judicial candidates. According to the terms of Rule 2.10(B), judges are prohibited from making "pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office," but this is further qualified by the narrowing statement "in connection with cases, controversies, or issues that are likely to come before the court." Rule 4.1(A)(13) makes Rule 2.10(B) applicable to both judges and judicial candidates in the context of political and campaign activities. *See* Rule 4.1, cmt. 14. By contrast, the more restrictive "pledges or promises clause" (former Canon 5A(3)(d)(i)) prohibited candidates for judicial office from making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office," and the more restrictive "commits clause" (former Canon 5A(3)(d)(ii)) prohibited candidates for judicial office from making "statements that commit or appear

to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." Thus, unlike the old standards, Rule 2.10(B) does not restrict the pledges or promises that judges and judicial candidates may make to the faithful and impartial performance of the duties of the office, and it does not include the "appear to commit" language that was problematic in the "commits clause."

Comment 1 to Rule 2.10 indicates that the rule's "restrictions on judicial speech are essential to the maintenance of the independence, integrity, and impartiality of the judiciary." Rule 2. 10, cmt. 1. On its face, this rule links its restrictions of judicial speech to the compelling interests of judicial independence (a judge's freedom from influence or controls other than those established by law), judicial integrity (a judge's probity, fairness, honesty, uprightness, and character), and judicial impartiality (the absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as the maintenance of an open mind in considering issues that may come before the judge). As noted earlier, Indiana's interests in judicial independence, integrity, and impartiality were not spawned overnight, but instead have a long history that extends back several centuries.

Comment 13 to Rule 4.1 observes that "[t]he role of a judge is different from that of a legislator or executive branch official, even when the judge is subject to public election." Rule 4.1, cmt. 13. As a consequence, "[c]ampaigns for judicial office must be conducted differently from campaigns for other offices." Rule 4.1, cmt. 13. This comment also expresses the Indiana Supreme Court's view that "[t]he narrowly drafted restrictions upon political and campaign activities of

judicial candidates provided in Canon 4 allow candidates to conduct campaigns that provide voters with sufficient information to permit them to distinguish between candidates and make informed electoral choices." Rule 4.1, cmt. 13.

The scope of prohibited conduct and speech under Rule 2.10(B) (together with Rule 4.1(A)(13)) is limited to pledges, promises, and commitments that compromise or undercut a judge's impartiality as to cases, controversies, and issues that are likely to come before the judge. Thus, judges and judicial candidates are permitted to make pledges, promises, and commitments that are consistent with judicial impartiality. Comment 15 to Rule 4.1 indicates that the propriety of pledges, promises, and commitments "is not dependent upon, or limited to, the use of any specific words or phrases," but that an objective, "totality of the statement" test will be applied to pledges, promises, and commitments "to determine if a reasonable person would believe that the candidate for judicial office has specifically undertaken to reach a particular result." Rule 4.1, cmt. 15. Such an objective standard is consistent with the objective test put forward by the Supreme Court in *Caperton*.

The comments to Rule 4.1 provide additional guidance to judges and judicial candidates regarding what is permitted and what is prohibited. The comments expressly indicate that certain statements or announcements are permitted, as well as certain pledges, promises, or commitments. Judges and judicial candidates may make "statements or announcements of personal views on legal, political, or other issues, which are not prohibited." Rule 4.1, cmt. 15. However, they are encouraged, when they "mak[e]

such statements" (in contrast to pledges, promises, or commitments), to "acknowledge the overarching judicial obligation to apply and uphold the law, without regard to [their] personal views." Rule 4.1, cmt. 15. Judges and judicial candidates may also "make campaign promises related to judicial organization, administration, and court management, such as a promise to dispose of a backlog of cases, start court sessions on time, or avoid favoritism in appointments and hiring." Rule 4.1, cmt. 16. Similarly, they may "pledge to take action outside the courtroom, such as working toward an improved jury selection system, or advocating for more funds to improve the physical plant and amenities of the courthouse." Rule 4.1, cmt. 16. As for questionnaires, Comment 17 provides the following:

> Judicial candidates may receive questionnaires or requests for interviews from the media and from issue advocacy or other community organizations that seek to learn their views on disputed or controversial legal or political issues. Paragraph (A)(13) does not specifically address judicial responses to such inquiries. Depending upon the wording and format of such questionnaires, candidates' responses might be viewed as pledges, promises, or commitments to perform the adjudicative duties of office other than in an impartial way. To avoid violating paragraph (A)(13), therefore, candidates who respond to media and other inquiries should also give assurances that they will keep an open mind and will carry out their adjudicative duties faithfully and impartially if elected. Candidates who do not respond may state their reasons for not responding, such as

> the danger that answering might be perceived by a reasonable person as undermining a successful candidate's independence or impartiality, or that it might lead to frequent disqualification. See Rule 2.11.

Rule 4.1, cmt. 17.

It is apparent from Rules 2.10(B) and 4.1(A)(13) that the Indiana Supreme Court expects judges and judicial candidates to exercise good judgment and to act judiciously when they make statements in office or in a campaign for office. This is not unreasonable, especially considering the training and experience judges and judicial candidates have in the law and the office sought. Additionally, it is reasonable to understand the role of a judge and the judicial office to be different from the roles of politicians and other elective offices and to treat judicial campaigns differently from campaigns for other offices, as Comment 13 to Rule 4.1 indicates. *See White,* 536 U.S. at 783, 122 S.Ct. 2528 (responding to Justices Ginsburg and Stevens that the majority "neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office"). Under the 2009 Code, judges and judicial candidates may engage in a wide range of speech and may answer surveys and questionnaires. They may express their views on legal, political, and other issues, as the Supreme Court's opinion in *White* and Preliminary Advisory Opinion # 1-02 permit. However, when they choose to speak, they must be thoughtful, judicious, and circumspect to ensure that through their conduct and speech they do not make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office

(such as by committing to resolve matters in pending or impending matters in certain ways) or that undercut the judge's impartiality as to cases, controversies, and issues that are likely to come before the judge.

Considering the broad speech permitted under Rules 2.10(B) and 4.1(A)(13), the narrow scope of conduct and speech prohibited under these rules, and the careful definition of permissible and prohibited conduct and speech in the rules and comments, the Court finds that the Indiana Supreme Court has narrowly tailored Rules 2.10(B) and 4.1(A)(13) so that only speech that is inconsistent with impartiality is prohibited in the 2009 Code and that the Indiana Supreme Court has addressed the overbroad and vagueness concerns related to the former "pledges or promises clause" and the former "commits clause."

As to the IRL questionnaire, the Court finds that the Pledges, Promises, and Commitments Prohibition of the 2009 Code does not prohibit judges and judicial candidates from answering IRL's 2008 nine-proposition questionnaire.[15] Preliminary Advisory Opinion # 1-02 indicates that, under the First Amendment, judges and judicial candidates are permitted to state their general views about disputed social and legal issues, including

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[15]It should go without saying that the Court in this case (like Judge Sharp in *Shepard I*) "comes to its decision without regard to the political or social agendas of the Plaintiffs in this matter," and thus "nothing in this Court's order should be read to compel, or even encourage, judges or judicial candidates to answer questions put to them by these plaintiffs or any other group." *Shepard,* 463 F.Supp.2d at 890.

by way of example their views on abortion and the death penalty. It also recognizes their right to characterize themselves as conservative or tough on crime and to express themselves on a range of other philosophies and perspectives. Similarly, Comment 15 to Rule 4.1 indicates that judges and judicial candidates may make "statements or announcements of personal views on legal, political, or other issues, which are not prohibited." Rule 4.1, cmt. 15. Additionally, the ICJQ has not enforced the former "pledges or promises clause" or the "commits clause" against any respondent to IRL's questionnaires, and it has committed itself to enforcing the Pledges, Promises, and Commitments Prohibition "only in light of *Republican Party of Minnesota v. White,* 536 U.S. 765, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002)." (Defs.' Mem. in Supp. 12) (citing Defs.' Exs. A & H.) However, this conclusion applies to the nine propositions in the 2008 questionnaire, and the assessment could change depending on how questions are worded and framed, what answers questions are intend to elicit, and what responses judicial candidates make, as Comment 17 to Rule 4.1 indicates. The questionnaire could improved with clear assurances that judicial candidate respondents will keep an open mind and carry out their adjudicative duties faithfully and impartially if elected.

Because the scope of prohibited conduct and speech under Rule 2.10(B) is limited to pledges, promises, and commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office in connection with cases, controversies, or issues that are likely to come before the court and because Rules 2.10(B) and 4.1(A)(13) otherwise permit broad political speech, the Court finds that the Pledges, Promises, and

Commitments Prohibition of the 2009 Code is narrowly tailored to serve the compelling interests of judicial fairness, impartiality, independence, and integrity, as well as the principles of justice and the rule of law. Accordingly, the Plaintiffs' claim that the Pledges, Promises, and Commitments Prohibition (Rules 2.10(B) & 4.1(A)(13)) is unconstitutional on its face and as applied to the questionnaire fails, and on Counts III and IV, judgment will be entered in favor of the Defendants and against the Plaintiffs.

(2) *The Prior-Commitment Recusal Requirement*

The Prior-Commitment Recusal Requirement (Rule 2.11(A)(5) of the 2009 Code) is a specific provision that follows the more general disqualification requirement in current Rule 2.11(A). The general disqualification requirement, which requires judges to disqualify themselves in any proceeding in which their impartiality might reasonably be questioned, is essentially the same requirement as was found in former Canon 3E(1). Rule 2.11(A)(5) was added to the 2009 Code to mandate recusal in the specific circumstance where a judge (while he or she was a judge or a judicial candidate) has made a public statement (other than in a court proceeding, judicial decision, or opinion) that "commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy."

According to Comment 1 to Rule 2.11, the general disqualification requirement applies "whenever the judge's impartiality might reasonably be questioned," Rule 2.11, cmt. 1, and thus this general disqualification requirement employs an objective test, as *Caperton* and other Supreme Court precedent instruct.

Additionally, this general recusal requirement applies whether any of the specific circumstances identified in Rule 2.11 apply. The specific circumstances added to Rule 2.11 bring additional clarity, definiteness, and concreteness to the general recusal requirement. They also specify a range of particular circumstances that require recusal because they undercut judicial impartiality and integrity. For instance, Rules 2.11(A)(1), (3), and (6) address circumstances when a judge has a personal bias or prejudice concerning a party or has personal knowledge of facts that are in dispute in a case, when a judge knows that he or she (or a close relative) has an economic interest in the subject matter in controversy or in a party to the proceeding that could be substantially affected by the proceeding. As for the specific circumstance in Rule 2.11(A)(5) that requires disqualification, it includes public statements by judges or judicial candidates that commit or appear to commit the judges to reach particular results or to rule in particular ways in certain proceedings or controversies. Comment 7 to Rule 2.11 indicates that a statement that "appears to commit" under Rule 2.11(A)(5) is a statement "that a reasonable person would believe from the judge's public statement that the judge has specifically undertaken to reach a particular result," and thus the Prior-Commitment Recusal Requirement also employs an objective test.

The Plaintiffs are running up hill in challenging the general disqualification requirement and the Prior-Commitment Recusal Requirement, especially considering the Supreme Court's ruling in *Caperton* and the consistent decisions of courts upholding recusal requirements against constitutional challenges. *See, e.g., Shepard,* 463 F.Supp.2d at 886-87 (citing cases), *rev'd*

on other grounds, 507 F.3d 545. As explained earlier, the Supreme Court, in discussing the need for objective rules and standards, highlighted the challenge of defining with precision the disqualifying criteria, and the difficulty the law faces in superintending and reviewing a judge's own inquiry into actual bias. The *Caperton* Court noted approvingly "the judicial reforms the States have implemented to eliminate even the appearance of partiality." *Caperton,* 129 S.Ct. at 2266. In this context, the Court lauded the canon of judicial conduct that requires a judge to avoid impropriety and the appearance of impropriety and that makes the test for appearance of impropriety "whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired."[16] *Id.* (quotations and citations omitted). The *Caperton* Court also spoke approvingly of the canon of judicial conduct requiring a judge to "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned" and observed the similarity between that canon and 28 U.S.C. § 455(a), which requires that "[a]ny justice, judge, or magistrate

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[16]The canon referenced by the Supreme Court is part of Canon 1 in the 2009 Code and former Canon 2 in the pre-2009 Code. The test for appearance of impropriety is included in Comment 5 to Rule 1.2 of the 2009 Code, and it is "whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge."

judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[17] *Id.* (quotations and citations omitted). The Supreme Court highlighted the objective standard that applies to the disqualification question.[18] *Id.* (quotations and citations omitted). The *Caperton* Court itself employed an objective test in evaluating the recusal issue in that case, and it observed that objective standards may require a judge to recuse "whether or not actual bias exists or can be proved" and that due process " 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.' " *Id.* at 2265 (quoting *Murchison,* 349 U.S. at 136, 75 S.Ct. 623). As noted earlier, the *Caperton* Court acknowledged the important function of state codes of judicial conduct in maintaining the integrity of the judiciary and the rule of law and in safeguarding against judicial campaign abuses that imperil public confidence in the fairness and integrity of judges, and it approved of state judicial conduct codes imposing more rigorous standards to protect judicial integrity than the federal due process clause

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[17]The canon referenced by the Supreme Court is found in Rule 2.11(A) of the 2009 Code and former Canon 3E(1) of the pre-2009 Code.

[18] This same objective test is set forth in Comment 1 to Rule 2.11, which states that, "[u]nder this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (6) apply."

requires. Both the majority and the dissent in *Caperton* agreed that there is an important need to maintain a fair, independent, and impartial judiciary as well as the appearance of such a judiciary.

The Court finds that the Prior-Commitment Recusal Requirement (Rule 2.11(A)(5) of the 2009 Code), as well as the general disqualification requirement (Rule 2.11(A) of the 2009 Code), is narrowly tailored to serve judicial fairness, impartiality, independence, and integrity, as well as the principles of justice and the rule of law. Additionally, these rules are neither overbroad nor vague. These rules do not apply in every situation in which a judge makes a statement or expresses his or her views. Rather, they apply under the general disqualification requirement when a judge's impartiality is reasonably questioned (under an objective standard), and under the more specific circumstance when a judge's public statement commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy (under an objective standard). Additionally, a judge is capable of determining those circumstances when a statement might commit or appear to commit him or her to reach a particular result or rule in a particular way and thus require recusal. As the Court found above, judges and judicial candidates do not violate the Pledges, Promises, or Commitments Prohibition by answering IRL's questionnaire, as it was constituted in 2008, and thus judges and judicial candidates who respond to the questionnaire (worded and formatted as it was) express their views on certain legal, political, and social issues, but do not create a situation where their impartiality might reasonably be questioned or commit or appear to

commit to reach a particular result or to rule in a particular way. Accordingly, the Plaintiffs' claim that the Prior-Commitment Recusal Requirement (Rule 2.11(A)(5) of the 2009 Code), as well as the general disqualification requirement (Rule 2.11(A) of the 2009 Code), is unconstitutional fails, and on Count V, judgment will be entered in favor of the Defendants and against the Plaintiffs.

(3) *The Partisan Activities Restriction*

The Partisan Activities Restriction (Rules 4.1(A)(1) and (2) of the 2009 Code) is essentially the same as the "partisan activities clauses" of the pre-2009 Code (former Canon 5A(1)(a) & (c)). Except as otherwise permitted by the Code, it prohibits judges and judicial candidates from acting as leaders or holding offices in political organizations and making speeches on behalf of political organizations. The 2009 Code defines "political organization" as "a political party or other group sponsored by or affiliated with a political party or candidate, the principal purpose of which is to further the election or appointment of candidates for political office." The term, however, excludes a judicial candidate's campaign committee created pursuant to Rule 4.4.

Comment 1 to Rule 4.1 summarizes the interests implicated by the partisan activities of judges and judicial candidates:

> Even when subject to public election, a judge plays a role different from that of a legislator or executive branch official. Rather than making decisions based upon the expressed views or preferences of the electorate, a judge makes decisions based upon the law and the facts of

> every case. Public confidence in the independence and impartiality of the judiciary is eroded if judges or judicial candidates are perceived to be subject to political influence. In furtherance of this interest, judges and judicial candidates must, to the greatest extent possible, be free, and appear to be free, from political influence and partisan interests.

Therefore, this Canon permits only narrowly-tailored exceptions to the prohibitions against political activities of judges and judicial candidates, taking into account the different methods of judicial selection and the role of the electorate in selecting and retaining its judiciary.

Rule 4. 1, cmt. 1; *see also* Rule 4.2(A)(1) ("A judicial candidate in a partisan, nonpartisan, or retention public election shall ... act at all times in a manner consistent with the independence, integrity, and impartiality of the judiciary."). Rule 4.1(A)(1) prohibits judges and judicial candidates from assuming leadership roles in political organizations, but permits them to register to vote as members of a political party. Rule 4.1, cmt. 3. Rule 4.1(A)(2) prohibits judges and judicial candidates from making speeches on behalf of political organizations, but does not prohibit them from campaigning on their own behalf. Rule 4.1, cmt. 4. Of course, judges and judicial candidates may participate in the political process as voters, Rule 4.1, cmt. 6, and the family members of judges and judicial candidates are not bound by the Code (although some special concerns arise regarding public associations with the political activity and campaigns of family members and regarding the need to avoid any implication that the prestige of judicial office is being used), Rule 4.1, cmt.

5. Additionally, judges and judicial candidates may participate in ceremonies and similar public events with other public officials, such as riding in parades and participating in public inaugural activities, because they do not constitute political conduct. Rule 4.1, cmt. 8.

> Rule 4.1(C) permits the following activities:
>
> (C) A judge in an office filled by partisan election, a judicial candidate seeking that office, and a judicial officer serving for a judge in office filled by partisan election may at any time:
>
> (1) identify himself or herself as a member of a political party;
>
> (2) voluntarily contribute to and attend meetings of political organizations; and
>
> (3) attend dinners and other events sponsored by political organizations and may purchase a ticket for such an event and a ticket for a guest.

Rule 4.1(D) permits the following:

> A judge in an office filled by nonpartisan election other than a retention election, a judicial candidate seeking that office, and a judicial officer serving for a judge in an office filled by nonpartisan election may at any time attend dinners and other events sponsored by political organizations and may purchase a ticket for such an event and a ticket for a guest.

In addition to the activities permitted under Rule 4.1(C), Rule 4.2(B) permits candidates for partisan

elective judicial offices to establish a campaign committee and accept campaign contributions pursuant to Rule 4.4; to speak on behalf of their own candidacies; to publicly endorse and contribute to candidates for election to public office running in the same election cycle; to attend dinners and other events for candidates for public office running in the same election cycle and to purchase a limited number of tickets for the event; to seek, accept, or use endorsements from any person or organization, including a political organization; and to identify themselves as candidates of a political organization. Thus, in partisan public elections for judicial office, a judicial candidate "may be nominated by, affiliated with, or otherwise publicly identified as a candidate of a political organization." Rule 4.2, cmt. 3. In addition to the activities permitted under Rule 4.1(B),[19] Rule 4.2(C) permits candidates for nonpartisan elective judicial office to establish a campaign committee and accept campaign contributions pursuant to Rule 4.4; to speak on behalf of their own candidacies; to publicly endorse, contribute to, and attend functions for other candidates running for the same judicial office for which they are running; and to seek, accept, or use endorsements from any appropriate person or organization other than a political organization. Rule 4.2(D) permits candidates for retention to judicial office to engage in certain specified campaign activities only when a candidate's retention has drawn active opposition. Rule 4.2, cmt. 1. In nonpartisan public elections or retention elections, "candidates are

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[19]Reference to Rule 4.1(B) appears to be a scrivener's error. It seems that the correct reference should be Rule 4.1(D).

prohibited from seeking, accepting, or using nominations or endorsements from partisan political organizations." Rule 4.2, cmt. 4. Additionally, "[a]lthough judicial candidates in nonpartisan public elections are prohibited from running on a ticket or slate associated with a political organization, they may group themselves into slates or other alliances to conduct their campaigns more effectively." Rule 4.2, cmt. 7. Rules 4.2(B) and (C) restrict the activities approved in Rules 4.2(B) and (C) to the period of "one year before the first applicable electoral event." Rule 4.2, cmt. 1. As noted above, judicial candidates in both partisan and nonpartisan elections may attend dinners and other events sponsored by political organizations and may purchase a ticket for such an event and a ticket for a guest. Rule 4.2, cmt. 5. Although Rule 4.2(B), (C), and (D) "permit judicial candidates in public elections to engage in some political or campaign activities otherwise prohibited by Rule 4.1," Rule 4.2, cmt. 1, "judicial candidates for public election remain subject to many of the provisions of Rule 4.1," for example, the prohibition on soliciting funds for a political organization and making certain promises, pledges, or commitments related to future adjudicative duties, Rule 4.2, cmt. 2.

From a review of Canon 4 and the rules under it, it is apparent that the Partisan Activities Restriction is designed to serve the compelling interests in judicial independence (a judge's freedom from influence or controls other than those established by law), judicial integrity (a judge's probity, fairness, honesty, uprightness, and character), and judicial impartiality (the absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as the maintenance of an open mind in considering issues

that may come before the judge), as well as the principles of justice and the rule of law. It is informed by the Indiana Supreme Court's understanding of the adjudicative function of courts and the important role of judges in making decisions in specific cases based upon their application of the law to the facts of each case. The Court finds that the Indiana Supreme Court has carefully designed the rules and the exceptions to serve these interests and has tailored them to address the different methods of judicial selection in Indiana (methods prescribed by the people of Indiana through the Indiana Constitution and by their representatives through statutes) and to enhance the role of the electorate in selecting and retaining its judiciary. Under the restriction, the type and the level of partisan activities permitted vary depending upon the applicable method of selection, and this fine-tuning of the restriction serves to adjust the means (the regulation of partisan activities) to fit the ends (the identified interests).

Judge Certo wants to engage in partisan activities (including serving as a delegate to the Indiana State Republican Convention and speaking on behalf of Republican judges and the Republican Party) that are presently proscribed by the rules. He argues that the Partisan Activities Restriction is underinclusive, overbroad, and vague. Relying largely on considerations of open-mindedness, he claims the Partisan Activities Restriction is underinclusive for the following reasons: some judicial candidates have long histories as politicians prior to seeking judicial office, but the restriction does not safeguard against such threatened impartiality; the restriction permits some partisan activities and associations between candidates and

political parties, but it prohibits other activities; and the restriction does not prohibit judges and judicial candidates from being leaders and making speeches on behalf of groups such as the Sierra Club and the National Rifle Association, which exist to advocate on behalf of certain issues, but it does not safeguard against any threat posed thereby to impartiality. He thinks the restriction is overbroad because he believes the restriction bans "all speech made in favor of a political party, which effectively prohibits candidates from announcing their views." (Pls.' Mem. in Supp. 34.) He thinks the restriction is vague because it does not clearly define what it means to act as a leader in a political organization and because the ban against speaking on behalf of a political organization fails to give fair warning of what conduct is prohibited.

The Court is not persuaded by Plaintiff Certo's underinclusive, overbroad, and vagueness arguments. The Partisan Activities Restriction is not as restrictive on speech and association as Judge Certo makes it out to be. The 2009 Code permits Judge Certo to engage in a broad range of speech (including expressions of views on legal, political, and social issues) and to identify with a political organization and attend political events. Additionally, the interests served by this restriction extend well beyond open-mindedness and include, as the Court noted earlier, judicial independence, integrity, and impartiality, as well as the principles of justice and the rule of law. To limit the potential harm that results from judges acting based upon political influence, party agendas, and partisan interests rather than the rule of law, the Indiana Supreme Court has determined that the partisan activities of judges and judicial candidates should be regulated so

as to permit those with less potential for harm and prohibit those with the greatest potential for harm. As the Supreme Court noted in *Caperton*, there is an important need to maintain a judiciary that is (and appears to be) fair, independent, and impartial. It is true that some individuals with long political histories become judges, but they too become subject to the same rules governing judicial impartiality, independence, and integrity, which helps to put their political and partisan histories in the past. Prohibiting judges and judicial candidates from acting as leaders and holding offices in political organizations and from making speeches on behalf of political organizations addresses concerns raised by public and official involvement with political organizations and their agendas, but these concerns do not arise or do not rise to the same level with campaign activities permitted by Rules 4.1 and 4.2. Plaintiff Certo is correct that Canon 4 and the related rules address political and campaign activities of judicial candidates in public elections, and not other potential associations that judicial candidates may have, such affiliations with churches, issue advocacy groups, or other nonprofit institutions. However, to be constitutional the Partisan Activities Restriction and the other rules related to Canon 4 need not address all other potential associations and activities, which may be more appropriately addressed by general rules such as the disqualification requirement. The rules regulating the political and campaign activities of judges and judicial candidates are tailored to address the special threats to judicial fairness, impartiality, independence, and integrity, as well as the principles of justice and the rule of law, that are posed by involvement in ordinary political and campaign activities in public

elections. Finally, judges and judicial candidates are capable of determining what it means to act as leaders (i.e., to "assum[e] leadership roles," Rule 4.1, cmt. 3) and hold offices in political organizations and what it means to make a speech on behalf of a political organization.

For these reasons, the Court finds that the Partisan Activities Restriction (Rules 4.1(A)(1) and (2) of the 2009 Code) is narrowly tailored to serve judicial fairness, impartiality, independence, and integrity, as well as the principles of justice and the rule of law. Accordingly, Plaintiff Certo's claim that the Partisan Activities Restriction (Rules 4.1(A)(1) and (2) of the 2009 Code) is unconstitutional on its face and as applied fails, and on Counts VIII and IX, judgment will be entered in favor of the Defendants and against the Plaintiffs.

(4) *The Partisan Solicitation Restriction*

The Partisan Solicitation Restriction (Rules 4.11(A)(4) & (8) of the 2009 Code) is essentially the same as the "solicitation clauses" in the pre-2009 Code (former Canons 5A(1)(e) & 5C(2)). Except as otherwise permitted by the Code, it prohibits judges and judicial candidates from soliciting funds for, paying assessments to, or making contributions to political organizations or candidates for public offices and from personally soliciting or accepting campaign contributions other than through a campaign committee authorized by Rule 4.4.

The Court's earlier discussion of general considerations relative to the Partisan Activities Restriction applies to its evaluation of the Partisan Solicitation Restriction, and the Court will not repeat it here. It is

helpful to consider the comments included under Rule 4.4 that relate to the Partisan Solicitation Restriction. Comment 1 to Rule 4.4 recognizes that, "in many jurisdictions, judicial candidates must raise campaign funds to support their candidacies, and [Rule 4.4] permits candidates, other than candidates for appointive judicial office or candidates for retention who have not met active opposition, to establish campaign committees to solicit and accept reasonable financial contributions or in-kind contributions." Rule. 4.4, cmt. 1. However, judicial candidates "are prohibited [by Rule 4.1(A)(8)] from personally soliciting campaign contributions or personally accepting campaign contributions." Although judicial candidates "are responsible for compliance with the requirements of election law and other applicable law, and for the activities of their campaign committees," campaign committees "may solicit and accept campaign contributions, manage the expenditure of campaign funds, and generally conduct campaigns." Rule 4.4, cmt. 2. Judicial candidates are required to instruct their campaign committees, at the beginning of a campaign, "to solicit or accept only such contributions as are reasonable in amount, appropriate under the circumstances, and in conformity with applicable law." Rule 4.4, cmt. 3. Comment 3 to Rule 4.4 provides additional instruction regarding lawyers and others who might appear before a successful candidate:

> Although lawyers and others who might appear before a successful candidate for judicial office are permitted to make campaign contributions, the candidate should instruct his or her campaign committee to be especially cautious in connection with such contributions, so

> they do not create grounds for disqualification [under Rule 2.11] if the candidate is elected to judicial office.

Rule 4.4, cmt. 3.

Plaintiff Certo argues that the Partisan Solicitation Restriction does not serve the interest in preserving impartiality, that it is underinclusive by prohibiting personal solicitations while permitting judicial candidates to know who has donated to their campaigns and by not prohibiting candidates from accepting funds, and that it is overbroad in prohibiting any and all personal solicitations, rather than quid pro quo solicitations that pose the real concern. However, Rule 4.1(A)(8) does prohibit personal solicitation or acceptance of campaign contributions, except through the campaign committee mechanism. Additionally, the interests served by the Partisan Solicitation Restriction are several, including judicial fairness, impartiality, independence, and integrity, as well as the principles of justice and the rule of law. It protects both the judiciary and potential donors (whether citizens or attorneys), and Plaintiff Certo has himself admitted that personal solicitations have additional leverage. This restriction is designed to safeguard the judiciary and judges from political influence and partisan interests and to promote public confidence in the independence and impartiality of the judiciary. The interest in judicial independence is served by prohibiting solicitations, payments, and contributions that have the potential to compromise a judge's freedom from influence or control. The interest in judicial impartiality is served by restricting solicitations, payments, and contributions that have the potential to contribute to bias or prejudice in favor of or against

particular parties or classes of parties and undermine the maintenance of an open mind in considering issues that come before the judge. Likewise, the interest in judicial integrity is served by limiting solicitations, payments, and contributions that have the potential to compromise a judge's probity, fairness, honesty, uprightness, and soundness of character. The restriction promotes the principles of justice and the rule of law by building barriers between judges and partisan politics and giving added insurance that judges will decide cases based upon the law applied to the facts, rather than solicitations accepted or turned away, money paid or not, and contributions made or not. Again, there is a significant difference between candidates, on the one hand, identifying themselves as members of political parties and attending political events and, on the other hand, soliciting funds for a political party or a candidate. This difference warrants permitting the one and prohibiting the other. Additionally, although Plaintiff Certo may have campaign debts that he desires to retire and a personal desire to engage in some presently prohibited solicitation activities, he has come forward with little evidence to show that his circumstances or desires are unique or that he is somehow specially affected by an application of the Partisan Solicitation Restriction.

For these reasons, the Court finds that the Partisan Solicitation Restriction (Rules 4.11(A)(4) & (8) of the 2009 Code) is narrowly tailored to serve judicial fairness, impartiality, independence, and integrity, as well as the principles of justice and the rule of law. Accordingly, Plaintiff Certo's claim that the Partisan Solicitation Restriction (Rules 4.11(A)(4) & (8) of the 2009 Code) is unconstitutional on its face and as

applied fails, and on Counts VI and VII, judgment will be entered in favor of the Defendants and against the Plaintiffs.

CONCLUSION

For the foregoing reasons, the Court DENIES the Plaintiffs' Motion for Summary Judgment [DE 70] and GRANTS IN PART and DENIES IN PART the Defendants' Motion for Summary Judgment [DE 72]. The Court ORDERS that Counts I and II of the Plaintiffs' Verified Second Amended Complaint for Relief BE DISMISSED WITH PREJUDICE and that the preliminary injunction entered on May 6, 2008, BE VACATED. The Court also ORDERS that JUDGMENT BE ENTERED in favor of the Defendants and against the Plaintiffs on Counts III through IX of the Plaintiffs' Verified Second Amended Complaint for Relief.

U.S. Const. amend. I (in relevant part)

Congress shall make no law . . . abridging the freedom of speech[.]

Indiana Code of Judicial Conduct

RULE 2.10: Judicial Statements on Pending and Impending Cases

***

(B) A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial* performance of the adjudicative duties of judicial office.

***

RULE 4.1: Political and Campaign Activities of Judges and Judicial Candidates in General

(A) Except as permitted by law,* or by Rules 4.1(B),

4.1(C), 4.2, 4.3, and 4.4, a judge or a judicial candidate* shall not:

(1) act as a leader in or hold an office in a political organization;*

(2) make speeches on behalf of a political organization;

(3) publicly endorse or oppose a candidate for any public office;

(4) solicit funds for, pay an assessment to, or make a contribution* to a political organization or a candidate for public office;

(5) attend or purchase tickets for dinners or other events sponsored by a political organization or a candidate for public office;

(6) publicly identify himself or herself as a member or candidate of a political organiza-

tion;

(7) seek, accept, or use endorsements from a political organization;

(8) personally solicit* or accept campaign contributions other than through a campaign committee authorized by Rule 4.4;

(9) use or permit the use of campaign contributions for the private benefit of the judge, the candidate, or others;

(10) use court staff, facilities, or other court resources in a campaign for judicial office or for any political purpose;

(11) knowingly,* or with reckless disregard for the truth, make any false or misleading statement;

(12) make any statement that would reason-

ably be expected to affect the outcome or impair the fairness of a matter pending* or impending* in any court; or

(13) in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial* performance of the adjudicative duties of judicial office.

(B) A judge or judicial candidate shall take reasonable measures to ensure that other persons do not undertake, on behalf of the judge or judicial candidate, any activities prohibited under paragraph (A).

(C) A judge in an office filled by partisan election, a judicial candidate seeking that office, and a judicial officer serving for a judge in office filled by partisan election may at any time:

(1) identify himself or herself as a member of a political party;

(2) voluntarily contribute to and attend meetings of political organizations; and

(3) attend dinners and other events sponsored by political organizations and may purchase a ticket for such an event and a ticket for a guest.

(D) A judge in an office filled by nonpartisan election other than a retention election, a judicial candidate seeking that office, and a judicial officer serving for a judge in an office filled by nonpartisan election may at any time attend dinners and other events sponsored by political organizations and may purchase a ticket for such an event and a ticket for a guest.

Comment

***

[15] The making of a pledge, promise, or commitment is not dependent upon, or limited to, the use of any specific words or phrases; instead, the totality of the statement must be examined to determine if a reasonable person would believe that the candidate for judicial office has specifically undertaken to reach a particular result. Pledges, promises, or commitments must be contrasted with statements or announcements of personal views on legal, political, or other issues, which are not prohibited. When making such statements, a judge should acknowledge the overarching judicial obligation to apply and uphold the law, without regard to his or her personal views.

INDIANA RIGHT TO LIFE JUDICIAL CANDIDATE QUESTIONNAIRE

INTRODUCTION

In *Republican Party of Minnesota v. White*, 122 S. Ct. 2528 (2002), the U.S. Supreme Court recently held unconstitutional a canon of judicial ethics that prohibited candidates for elective judicial office from announcing their views on disputed legal or political issues. The canon violated the First Amendment because it prohibited speech on the basis of content and burdened speech of political candidates – a category of speech at the core of First Amendment freedoms. **Judicial candidates may clearly express their views on legal and political issues without fear of being sanctioned by judicial or legal ethics authorities for doing so.**

Indiana Right to Life, Inc., certainly recognizes that judicial candidates should maintain actual and apparent impartiality. Thus, Indiana Right to Life recognizes that judicial candidates should not pledge or promise certain results in particular cases that may come before them. Nevertheless, in judicial elections, voters need to know the views of judicial candidates in order to make intelligent and conscientious decisions regarding candidates' general views on the law and personal values. This questionnaire is intended to elicit candidates' views on issues of vital interest to the constituents of Indiana Right to Life without subjecting candidates answering its questions to accusations of partiality or requiring candidates to recuse themselves in future cases.

* * * * * *

1. **VALUE OF EARLY HUMAN LIFE.** While recognizing the judicial obligation to follow binding precedents of higher courts and applicable constitutional and statutory provisions, to honor stare decisis, and to decide any future case based on the law and facts of that case, in accord with the position of Indiana Right to Life, **I believe that the unborn child is biologically human and alive and that the right to life of human beings should be respected at every stage of their biological development.**

_____Agree _____Disagree _____Undecided
_____Decline* _____Refuse to Answer

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*By declining to answer, I assert that I would have replied to this question but for the prospect that I may be disciplined for doing so under Indiana Judicial Canon 5A(3)(d)(i) and (ii)—which provides that a judicial candidate "shall not: (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; [or] (ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." My response would neither cause me to be biased for or against parties nor affect my ability to be open-minded with regard to any issue.

2. **LEGAL ABORTION.** Indiana Right to Life believes that unborn children should be protected by law and that abortion should be permitted only when necessary to prevent the death of the mother. While recognizing the judicial obligation to follow binding precedents of higher courts and applicable constitutional and statutory provisions, to honor stare decisis, and to decide any future case based on the law and facts of that case, state your personal view on when, if ever, abortion should be legal.

a. **I believe that abortion should be permitted only to prevent the death of the mother.**

_____Agree _____Disagree _____Undecided
_____Decline* _____Refuse to Answer

b. **I believe that abortion should be permitted only to prevent the mother's death, in cases of incest, and in reported cases of forcible rape.**

_____Agree _____Disagree _____Undecided
_____Decline* _____Refuse to Answer

c. **Other (please explain)**

_____
_____
_____
_____
_____
_____

3. **FEDERAL CONSTITUTIONAL RIGHT TO ABORTION.** In its 1973 ruling in *Roe v. Wade*, 410 U.S. 113 (1973), the U.S. Supreme Court found a "right to abortion" under the U.S. Constitution that invalidated the abortion statutes of all 50 states. While recognizing the judicial obligation to follow binding precedents of higher courts and applicable constitutional and statutory provisions, to honor stare decisis, and to decide any future case based on the law and facts of that case, **I believe that *Roe v. Wade* was wrongly decided.**

_____Agree _____Disagree _____Undecided
_____Decline* _____Refuse to Answer

4. **STATE CONSTITUTIONAL RIGHT TO ABORTION.** Aside from the federal constitutional "right to abortion" recognized in *Roe v. Wade*, several *state* courts have held that there is a *state* right to abortion under their *state* constitutions. Thus far, the courts of Indiana have not recognized a "right to abortion" under the Indiana Constitution. While recognizing the judicial obligation to follow binding precedents of higher courts and applicable constitutional and statutory provisions, to honor stare decisis, and to decide any future case based on the law and facts of that case, **I believe that there is no provision in our current Indiana Constitution which is intended to protect a right to abortion.**

_____Agree _____Disagree _____Undecided
_____Decline* _____Refuse to Answer

5. **STATE RIGHT TO ABORTION FUNDING.** In several decisions, the U.S. Supreme Court has upheld under the U.S. Constitution the decisions of federal, state, and local governments to prohibit the use of public funds or facilities for abortion when the mother's life was not at stake. However, several *state* courts have held under *state* constitutions that public funds and facilities must be made available to fund and facilitate abortion when a physician deems abortion "necessary" for any reason. State Supreme Courts in New Jersey and Alaska have held that under state law abortion must be provided in even private non-religious facilities that serve the public at large or when abortion would otherwise be unavailable in a locale.

The Indiana Supreme Court, in *Humphreys v. Clinic for Women*, 796 N.E.2d 247 (Ind. 2003), held that the Indiana Medicaid program must pay "for abortions to preserve the lives of pregnant women and where pregnancies are caused by rape or incest, [and] it must also pay for abortions for Medicaid-eligible women whose pregnancies create serious risk of substantial and irreversible impairment of a major bodily function." *Id.* at 260.

While recognizing the judicial obligation to follow binding precedents of higher courts and applicable constitutional and statutory provisions, to honor stare decisis, and to decide any future case based on the law and facts of that case, **I believe that *Hunphreys v. Clinic for Women* was wrongly decided.**

_____Agree _____Disagree _____Undecided
_____Decline* _____Refuse to Answer

6. **STATE RIGHT TO ASSISTED SUICIDE.** In *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997), the U.S. Supreme Court held that there is no right to assisted suicide under the U.S. Constitution. In a companion case, *Vacco v. Quill*, 117 S. Ct. 2293 (1997), the Supreme Court also held that equal protection of law under U.S. Constitution was not violated by a ban on physician assisted suicide for the terminally ill, although the law permits life-sustaining treatment to be withheld or withdrawn from the terminally ill. The state Supreme Courts of Florida and Alaska have held that their state constitutions do not protect a right to assisted suicide. While recognizing the judicial obligation to follow binding precedents of higher courts and applicable constitutional and statutory provisions, to honor stare decisis, and to decide any future case based on the law and facts of that case, **I believe that there is no provision of the current Indiana Constitution which is intended to protect a right to assisted suicide.**

_____Agree _____Disagree _____Undecided
_____Decline* _____Refuse to Answer

7. **DISPOSITION OF HUMAN BEINGS IN VITRO.** While recognizing the judicial obligation to follow binding precedents of higher courts and applicable constitutional and statutory provisions, to honor stare decisis, and to decide any future case based on the law and facts of that case, in accord with the position of Indiana Right to Life, **I believe that human beings whose lives begin by in vitro fertilization or cloning and who exist outside the**

body of a woman are not personal property and should be treated in accord with their best interests in any dispute over their disposition.

_____Agree _____Disagree _____Undecided
_____Decline* _____Refuse to Answer

8. **WRONGFUL LIFE.** Suits have been brought in several states by infants born with disabilities through their parents, claiming that those responsible for maternal health care during pregnancy are financially liable for their "wrongful lives" because their mothers were not afforded the opportunity to abort them by being told that they would be born with a disability. While recognizing the judicial obligation to follow binding precedents of higher courts and applicable constitutional and statutory provisions, to honor stare decisis, and to decide any future case based on the law and facts of that case, **I do not believe that a person should be able to sue another because he or she was born alive with a disability rather than aborted.**

_____Agree _____Disagree _____Undecided
_____Decline* _____Refuse to Answer

9. **WRONGFUL BIRTH.** Suits have been brought in several states by parents of children born with disabilities against maternal health care providers for the care and upkeep of their disabled children because the mothers were not provided the opportunity to have their unborn children tested for disabilities so that a "wrongful birth" could have been avoided by aborting any disabled child.

The Indiana Supreme Court has accepted the following definition: "'Wrongful birth' claims are generally described as causes of action brought by the parents of a child born with birth defects alleging that due to negligent medical advice or testing they were precluded from making an informed decision about whether to conceive a potentially handicapped child or, in the event of a pregnancy, to terminate it." *Bader v. Johnson*, 732 N.E.2d 1212, 1216 n.3 (Ind. 2000) (citation omitted). The *Bader* court held that "we have determined that this case should be treated no differently than any other medical malpractice case." *Id.* at 1220.

While recognizing the judicial obligation to follow binding precedents of higher courts and applicable constitutional and statutory provisions, to honor stare decisis, and to decide any future case based on the law and facts of that case, **I believe that *Bader v. Johnson*, 732 N.E.2d 1212 (2000) was wrongly decided.**

_____Agree _____Disagree _____Undecided
_____Decline* _____Refuse to Answer

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF INDIANA
LAFAYETTE DIVISION

INDIANA RIGHT TO LIFE, INC., ARLINE SPRAU, and MARY P. HALL, Plaintiffs, vs. RANDALL T. SHEPARD, *et al.*, Defendants.	Case No. 4:04CV0071AS

ANSWERS TO PLAINTIFFS' REQUESTS FOR ADMISSION

Defendants, Randall T. Shepard, *et al.* (collectively the "Commission"), by counsel, and pursuant to Federal Rule of Civil Procedure 36, hereby responds to Plaintiffs, Indiana Right to Life, Inc.'s, Arline Sprau's, and Mary P. Hall's (collectively "Right to Life"), Requests for Admissions as follows:

1. a. The 2004 Candidate Questionnaire does not ask judicial candidates to commit or appear to commit themselves with respect to cases, controversies or issues that are likely to come before the court.

RESPONSE: DENIED. Because the Commission has

filed a Motion to Dismiss Right to Life's Amended Complaint based on standing, ripeness, and abstention issues, which is currently pending before the court, Right to Life is not entitled to any answers. Even if the Motion to Dismiss is denied, the Commission denies this Request because, primarily, it has not made a decision as to whether responding to the Questionnaire would constitute a commitment. Further, parts of the Questionnaire ask questions that may elicit answers which suggest the judicial candidate's predispositions on issues, which in turn, may commit or appear to commit the judgeljudicial candidate to rule in a particular way if those issues are later presented to the judge.

b. The request for admission in part a. of this request is based on the application of the commits clause to the stated facts.

RESPONSE: DENIED. The Commission does not know or have any information on what the stated facts are or upon what information Right to Life intended to base part a. of this Request.

2. a. The 2004 Candidate Questionnaire does not ask judicial candidates to make a pledge or promise other than the faithful and impartial performance of the duties of the office.

RESPONSE: DENIED. Because the Commission has filed a Motion to Dismiss Right to Life's Amended Complaint based on standing, ripeness, and abstention issues, which is currently pending before the court, Right to Life is not entitled to any answers. Even if the

Motion to Dismiss is denied, the Commission denies this Request because, primarily, it has not made a decision as to whether responding to the Questionnaire would constitute a promise or a pledge. Further, parts of the Questionnaire ask questions that may elicit answers which suggest the judicial candidate's predispositions on issues, which in turn, may constitute pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.

b. The request for admission in part a. of this request is based on the application of the pledges and promises to the stated facts.

RESPONSE: DENIED. The Commission does not know or have any information on what the stated facts are or upon what information Right to Life intended to base part a. of this Request.

3. a. Question 1 of the 2004 Candidate Questionnaire, which states: "I believe that the unborn child is biologically human and alive and that the right to life of human beings should be respected at every stage of their biological development," does not ask judicial candidates to commit or appear to commit themselves with respect to cases, controversies or issues that are likely to come before the court.

RESPONSE: DENIED. Because the Commission has filed a Motion to Dismiss Right to Life's Amended Complaint based on standing, ripeness, and abstention issues, which is currently pending before the court, Right to Life is not entitled to any answers. Even if the

Motion to Dismiss is denied, the Commission denies this Request because, primarily, it has not made a decision as to whether responding to the Questionnaire would constitute a commitment. Further, Question 1 of the Questionnaire may be viewed as possibly eliciting an answer from judicial candidates that may commit or appear to commit them to cases, controversies or issues that may likely come before them.

b. The request for admission in part a. of this request is based on the application of the commits clause to the stated facts.

RESPONSE: DENIED. The Commission does not know or have any information on what the stated facts are or upon what information Right to Life intended to base part a. of this Request.

4. a. Question 2 of the 2004 Candidate Questionnaire, which states: "I believe that abortion should be permitted to prevent the death of the mother" and "I believe that abortion should be permitted only to prevent the mother's death, in cases of incest, and in reported cases of forcible rape," does not ask judicial candidates to commit or appear to commit themselves with respect to cases, controversies or issues that are likely to come before the court.

RESPONSE: DENIED. Because the Commission has filed a Motion to Dismiss Right to Life's Amended Complaint based on standing, ripeness, and abstention issues, which is currently pending before the court, Right to Life is not entitled to any answers. Even if the Motion to Dismiss is denied, the Commission denies

this Request because, primarily, it has not made a decision as to whether responding to the Questionnaire would constitute a commitment. Further, Question 2 of the Questionnaire may be viewed as possibly eliciting an answer from judicial candidates that may commit or appear to commit them to cases, controversies or issues that may likely come before them.

b. The request for admission in part a. of this request is based on the application of the commits clause to the stated facts.

RESPONSE: DENIED. The Commission does not know or have any information on what the stated facts are or upon what information Right to Life intended to base part a. of this Request.

5. a. Question 3 of the 2004 Candidate Questionnaire, which states: "I believe that *Roe* v. *Wade* was wrongly decided," does not ask judicial candidates to commit or appear to commit themselves with respect to cases, controversies or issues that are likely to come before the court.

RESPONSE: DENIED. Because the Commission has filed a Motion to Dismiss Right to Life's Amended Complaint based on standing, ripeness, and abstention issues, which is currently pending before the court, Right to Life is not entitled to any answers. Even if the Motion to Dismiss is denied, the Commission denies this Request because, primarily, it has not made a decision as to whether responding to the Questionnaire would constitute a commitment. Further, Question 3 of the Questionnaire may be viewed as possibly eliciting

an answer from judicial candidates that may commit or appear to commit them to cases, controversies or issues that may likely come before them.

b. The request for admission in part a. of this request is based on the application of the commits clause to the stated facts.

RESPONSE: DENIED. The Commission does not know or have any information on what the stated facts are or upon what information Right to Life intended to base part a. of this Request.

6. a. Question 4 of the 2004 Candidate Questionnaire, which states: "I believe that there is no provision in our current Indiana Constitution which is intended to protect a right to abortion," does not ask judicial candidates to commit or appear to commit themselves with respect to cases, controversies or issues that are likely to come before the court.

RESPONSE: DENIED. Because the Commission has filed a Motion to Dismiss Right to Life's Amended Complaint based on standing, ripeness, and abstention issues, which is currently pending before the court, Right to Life is not entitled to any answers. Even if the Motion to Dismiss is denied, the Commission denies this Request because, primarily, it has not made a decision as to whether responding to the Questionnaire would constitute a commitment. Further, Question 4 of the Questionnaire may be viewed as possibly eliciting an answer from judicial candidates that may commit or appear to commit them to cases, controversies or issues that may likely come before them.

b. The request for admission in part a. of this request is based on the application of the commits clause to the stated facts.

RESPONSE: DENIED. The Commission does not know or have any information on what the stated facts are or upon what information Right to Life intended to base part a. of this Request.

7. a. Question 5 of the 2004 Candidate Questionnaire, which states: "I believe that *Humphreys v. Clinic for Women* was wrongly decided," does not ask judicial candidates to commit or appear to commit themselves with respect to cases, controversies or issues that are likely to come before the court.

RESPONSE: DENIED. Because the Commission has filed a Motion to Dismiss Right to Life's Amended Complaint based on standing, ripeness, and abstention issues, which is currently pending before the court. Right to Life is not entitled to any answers. Even if the Motion to Dismiss is denied, the Commission denies this Request because, primarily, it has not made a decision as to whether responding to the Questionnaire would constitute a commitment. Further, Question 5 of the Questionnaire may be viewed as possibly eliciting an answer from
judicial candidates that may commit or appear to commit them to cases, controversies or issues
that may likely come before them.

b. The request for admission in part a. of this request is based on the application of the commits clause to the

stated facts.

RESPONSE: DENIED. The Commission does not know or have any information on what the stated facts are or upon what information Right to Life intended to base part a. of this Request.

8. a. Question 6 of the 2004 Candidate Questionnaire, which states: "I believe that there is no provision of the current Indiana Constitution which is intended to protect a right to assisted suicide," does not ask judicial candidates to commit or appear to commit themselves with respect to cases, controversies or issues that are likely to come before the court.

RESPONSE: DENIED. Because the Commission has filed a Motion to Dismiss Right to Life's Amended Complaint based on standing, ripeness, and abstention issues, which is currently pending before the court, Right to Life is not entitled to any answers. Even if the Motion to Dismiss is denied, the Commission denies this Request because, primarily, it has not made a decision as to whether responding to the Questionnaire would constitute a commitment. Further, Question 6 of the Questionnaire may be viewed as possibly eliciting an answer from judicial candidates that may commit or appear to commit them to cases, controversies or issues that may likely come before them.

b. The request for admission in part a. of this request is based on the application of the commits clause to the stated facts.

RESPONSE: DENIED. The Commission does not

know or have any information on what the stated facts are or upon what information Right to Life intended to base part a. of this Request.

9. a. Question 7 of the 2004 Candidate Questionnaire, which states: "I believe that human beings whose lives begin by in vitro fertilization or cloning and who exist outside the body of a woman are not personal property and should be treated in accord with their best interests in any dispute over their disposition," does not ask judicial candidates to commit or appear to commit themselves with respect to cases, controversies or issues that are likely to come
before the court.

RESPONSE: DENIED. Because the Commission has filed a Motion to Dismiss Right to Life's Amended Complaint based on standing, ripeness, and abstention issues, which is currently pending before the court, Right to Life is not entitled to any answers. Even if the Motion to Dismiss is denied, the Commission denies this Request because, primarily, it has not made a decision as to whether responding to the Questionnaire would constitute a commitment.
Further, Question 7 of the Questionnaire may be viewed as possibly eliciting an answer fromjudicial candidates that may commit or appear to commit them to cases, controversies or issues that may likely come before them.

b. The request for admission in part a. of this request is based on the application of the commits clause to the stated facts.

RESPONSE: DENIED. The Commission does not know or have any information on what the stated facts are or upon what information Right to Life intended to base part a. of this Request.

10. a. Question 8 of the 2004 Candidate Questionnaire, which states: "I do not believe that a person should be able to sue another because he or she was born alive with a disability rather than aborted," does not ask judicial candidates to commit or appear to commit themselves with respect to cases, controversies or issues that are likely to come before the court.

RESPONSE: DENIED. Because the Commission has filed a Motion to Dismiss Right to Life's Amended Complaint based on standing, ripeness, and abstention issues, which is currently pending before the court, Right to Life is not entitled to any answers. Even if the Motion to Dismiss is denied, the Commission denies this Request because, primarily, it has not made a decision as to whether responding to the Questionnaire would constitute a commitment. Further, Question 8 of the Questionnaire may be viewed as possibly eliciting an answer from judicial candidates that may commit or appear to commit them to cases, controversies or issues that may likely come before them.

b. The request for admission in part a. of this request is based on the application of the commits clause to the stated facts.

RESPONSE: DENIED. The Commission does not know or have any information onwhat the stated facts are or upon what information Right to Life intended to

base part a. of this Request.

11. a. Question 9 of the 2004 Candidate Questionnaire, which states: "I believe that Bader v. *Johnsorz*, 732 N.E.2d 1212 (2000) was wrongly decided," does not ask judicial candidates to commit or appear to commit themselves with respect to cases, controversies or issues that are likely to come before the court.

RESPONSE: DENIED. Because the Commission has filed a Motion to Dismiss Right to Life's Amended Complaint based on standing, ripeness, and abstention issues, which is currently pending before the court, Right to Life is not entitled to any answers. Even if the Motion to Dismiss is denied, the Commission denies this Request because, primarily, it has not made a decision as to whether responding to the Questionnaire would constitute a commitment.
Further, Question 9 of the Questionnaire may be viewed as possibly eliciting an answer from
judicial candidates that may commit or appear to commit them to cases, controversies or issues
that may likely come before them.

b. The request for admission in part a. of this request is based on the application of the commits clause to the stated facts

RESPONSE: DENIED. The Commission does not know or have any information on what the stated facts are or upon what information Right to Life intended to base part a. of this Request.

12. a. Question 1 of the 2004 Candidate Questionnaire, which states: "I believe that the unborn child is biologically human and alive and that the right to life of human beings should be respected at every stage of their biological development," does not ask judicial candidates to make a pledge or promise in violation of the pledges and promises clause.

RESPONSE: DENIED. Because the Commission has filed a Motion to Dismiss Right to Life's Amended Complaint based on standing, ripeness, and abstention issues, which is currently pending before the court, Right to Life is not entitled to any answers. Even if the Motion to Dismiss is denied, the Commission denies this Request because, primarily, it has not made a decision as to whether responding to the Questionnaire would constitute a pledge or promise. Further, Question 1 of the Questionnaire may be viewed as eliciting an answer that suggests the judicial candidate's predispositions on issues which, in turn, may constitute pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.

b. The request for admission in part a. of this request is based on the application of the pledges and promises clause to the stated facts.

RESPONSE: DENIED. The Commission does not know or have any information on what the stated facts are or upon what information Right to Life intended to base part a. of this Request.

13. a. Question 2 of the 2004 Candidate Questionnaire, which states: "I believe that abortion should be permit-

ted only to prevent the death of the mother" and "I believe that abortion should be permitted only to prevent the mother's death, in cases of incest, and in reported cases of forcible rape," does not ask judicial candidates to make a pledge or promise in violation of the pledges and promises clause.

RESPONSE: DENIED. Because the Commission has filed a Motion to Dismiss Right to Life's Amended Complaint based on standing, ripeness, and abstention issues, which is currently pending before the court, Right to Life is not entitled to any answers. Even if the Motion to Dismiss is denied, the Commission denies this Request because, primarily, it has not made a decision as to whether responding to the Questionnaire would constitute a pledge or promise. Further, Question 2 of the Questionnaire may be viewed as eliciting an answer that suggests the judicial candidate's predispositions on issues which, in turn, may constitute pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.

b. The request for admission in part a. of this request is based on the application of the pledges and promises clause to the stated facts.

RESPONSE: DENIED. The Commission does not know or have any information on what the stated facts are or upon what information Right to Life intended to base part a. of this Request.

14. a. Question 3 of the 2004 Candidate Questionnaire, which states: "I believe that *Roe* v. Wade was wrongly

decided," does not ask judicial candidates to make a pledge or promise in violation of the pledges and promises clause.

RESPONSE: DENIED. Because the Commission has filed a Motion to Dismiss Right to Life's Amended Complaint based on standing, ripeness, and abstention issues, which is currently pending before the court, Right to Life is not entitled to any answers. Even if the Motion to Dismiss is denied, the Commission denies this Request because, primarily, it has not made a decision as to whether responding to the Questionnaire would constitute a pledge or promise. Further, Question 3 of the Questionnaire may be viewed as eliciting an answer that suggests the judicial candidate's predispositions on issues which, in turn, may constitute pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.

b. The request for admission in part a. of this request is based on the application of the pledges and promises clause to the stated facts.

RESPONSE: DENIED. The Commission does not know or have any information on what the stated facts are or upon what information Right to Life intended to base part a. of this Request.

15. a. Question 4 of the 2004 Candidate Questionnaire, which states: "I believe that there is no provision in our current Indiana Constitution which is intended to protect a right to abortion," does not ask judicial candidates to make a pledge or promise in violation of

the pledges and promises clause.

RESPONSE: DENIED. Because the Commission has filed a Motion to Dismiss Right to Life's Amended Complaint based on standing, ripeness, and abstention issues, which is currently pending before the court, Right to Life is not entitled to any answers. Even if the Motion to Dismiss is denied, the Commission denies this Request because, primarily, it has not made a decision as to whether responding to the Questionnaire would constitute a pledge or promise. Further, Question 4 of the Questionnaire may be viewed as eliciting an answer that suggests the judicial candidate's predispositions on issues which, in turn, may constitute pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.

b. The request for admission in part a. of this request is based on the application of the pledges and promises clause to the stated facts.

RESPONSE: DENIED. The Commission does not know or have any information on what the stated facts are or upon what information Right to Life intended to base part a. of this Request.

16. a. Question 5 of the 2004 Candidate Questionnaire, which states: "I believe that *Hurnphreys* v. ***Clinic*** *for Women* was wrongly decided," does not ask judicial candidates to make a pledge or promise in violation of the pledges and promises clause.

RESPONSE: DENIED. Because the Commission has

filed a Motion to Dismiss Right to Life's Amended Complaint based on standing, ripeness, and abstention issues, which is currently pending before the court, Right to Life is not entitled to any answers. Even if the Motion to Dismiss is denied, the Commission denies this Request because, primarily, it has not made a decision as to whether responding to the Questionnaire would constitute a pledge or promise. Further, Question 5 of the Questionnaire may be viewed as eliciting an answer that suggests the judicial candidate's predispositions on issues which, in turn, may constitute pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.

b. The request for admission in part a. of this request is based on the application of the pledges and promises clause to the stated facts.

RESPONSE: DENIED. The Commission does not know or have any information on what the stated facts are or upon what information Right to Life intended to base part a. of this Request.

17. a. Question 6 of the 2004 Candidate Questionnaire, which states: "I believe that there is no provision of the current Indiana Constitution which is intended to protect a right to assisted suicide," does not ask judicial candidates to make a pledge or promise in violation of the pledges and promises clause.

RESPONSE: DENIED. Because the Commission has filed a Motion to Dismiss Right to Life's Amended Complaint based on standing, ripeness, and abstention

issues, which is currently pending before the court, Right to Life is not entitled to any answers. Even if the Motion to Dismiss is denied, the Commission denies this Request because, primarily, it has not made a decision as to whether responding to the Questionnaire would constitute a pledge or promise. Further, Question 6 of the Questionnaire may be viewed as eliciting an answer that suggests the judicial candidate's predispositions on issues which, in turn, may constitute pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.

b. The request for admission in part a. of this request is based on the application of the pledges and promises clause to the stated facts.

RESPONSE: DENTED. The Commission does not know or have any information on what the stated facts are or upon what information Right to Life intended to base part a. of this Request.

18. a. Question 7 of the 2004 Candidate Questionnaire, which states: "I believe that human beings whose lives begin by in vitro fertilization or cloning and who exist outside the body of a woman are not personal property and should be treated in accord with their best interests in any dispute over their disposition,"does not ask judicial candidates to make a pledge or promise in violation of the pledges and promises clause.

RESPONSE: DENIED. Because the Commission has filed a Motion to Dismiss Right to Life's Amended Complaint based on standing, ripeness, and abstention

issues, which is currently pending before the court, Right to Life is not entitled to any answers. Even if the Motion to Dismiss is denied, the Commission denies this Request because, primarily, it has not made a decision as to whether responding to the Questionnaire would constitute a pledge or promise. Further, Question 7 of the Questionnaire may be viewed as eliciting an answer that suggests the judicial candidate's predispositions on issues which, in turn, may constitute pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.

b. The request for admission in part a. of this request is based on the application of the pledges and promises clause to the stated facts.

RESPONSE: DENIED. The Commission does not know or have any information on what the stated facts are or upon what information Right to Life intended to base part a. of this Request.

19. a. Question 8 of the 2004 Candidate Questionnaire, which states: "I do not believe that a person should be able to sue another because he or she was born alive with a disability rather than aborted," does not ask judicial candidates to make a pledge or promise in violation of the pledges and promises clause.

RESPONSE: DENIED. Because the Commission has filed a Motion to Dismiss Right to Life's Amended Complaint based on standing, ripeness, and abstention issues, which is currently pending before the court, Right to Life is not entitled to any answers. Even if the

Motion to Dismiss is denied, the Commission denies this Request because, primarily, it has not made a decision as to whether responding to the Questionnaire would constitute a pledge or promise. Further, Question 8 of the Questionnaire may be viewed as eliciting an answer that suggests the judicial candidate's predispositions on issues which, in turn, may constitute pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.

b. The request for admission in part a. of this request is based on the application of the pledges and promises clause to the stated facts.

RESPONSE: DENIED. The Commission does not know or have any information on what the stated facts are or upon what information Right to Life intended to base part a. of this Request.

20. a. Question 9 of the 2004 Candidate Questionnaire, which states: "I believe that *Bader v. Johnson*, 732 N.E.2d 1212 (2000) was wrongly decided," does not ask judicial candidates to make a pledge or promise in violation of the pledges and promises clause.

RESPONSE: DENIED. Because the Commission has filed a Motion to Dismiss Right to Life's Amended Complaint based on standing, ripeness, and abstention issues, which is currently pending before the court, Right to Life is not entitled to any answers. Even if the Motion to Dismiss is denied, the Commission denies this Request because, primarily, it has not made a decision as to whether responding to the Questionnaire would constitute a pledge or promise. Further, Ques-

tion 9 of the Questionnaire may be viewed as eliciting an answer that suggests the judicial candidate's predispositions on issues which, in turn, may constitute pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.

b. The request for admission in part a. of this request is based on the application of the pledges and promises clause to the stated facts.

RESPONSE: DENIED. The Commission does not know or have any information on what the stated facts are or upon what information Right to Life intended to base part a. of this Request.

[Admissions 21-29 have been omitted as they related to Canon 3E(1), which is not part of this appeal]

[signature block and certificate of service omitted]

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(2)

Supreme Court, U.S.
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No. 10-425

IN THE

Supreme Court of the United States

TORREY BAUER, The Honorable DAVID CERTO, and INDIANA RIGHT TO LIFE, INC.,
Petitioners,

v.

The Honorable RANDALL T. SHEPARD, in his official capacity as Chair of the Indiana Commission on Judicial Qualifications, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED

1. Whether, consistent with the First Amendment, Indiana may preclude judges and judicial candidates from, "in connection with cases, controversies, or issues that are likely to come before the court, mak[ing] pledges, promises, or commitments that are inconsistent with the impartial[] performance of adjudicative duties of judicial office."

2. Whether, consistent with the First Amendment, Indiana may stop judges and judicial candidates from leading or speaking on behalf of any political organization where Indiana permits them to be members of political parties and attend political functions.

3. Whether, consistent with the First Amendment, Indiana may prohibit judges and judicial candidates from personally soliciting or accepting campaign contributions as long as it permits them to do so through a campaign committee.

PARTIES TO THE PROCEEDINGS

A complete list of Respondents not contained in the caption:

Randall T. Shepard, Indiana Chief Justice and Chair
Mike Gavin
John O. Feighner
Christine H. Keck
Fred McCashland
James O. McDonald
William E. Winningham

All in their official capacities as Members of the Indiana Commission on Judicial Qualifications

Fred Austerman, Chair
Maureen Grinsfelder
Corinne R. Finnerty
Catherine A. Nestrick
R. Anthony Prather
J. Mark Robinson
William Anthony Walker
Anthony M. Zappia
Sally Franklin Zweig

All in their official capacities as Members of the Indiana Disciplinary Commission

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STATEMENT

By pressing for review of a handful of Indiana judicial canons, petitioners in effect ask the Court to consider whether the First Amendment, particularly in the wake of *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) ("*White I*"), requires states to open their judicial elections to unfettered politicking. None of the traditional reasons for granting *certiorari*, however, counsels in favor of indulging petitioners in their quest to make judicial elections look like legislative elections.

1. Six rules of the Indiana Code of Judicial Conduct, comprising three analytically useful groups relating to judicial election campaigns, are at stake here:

- **Canons 2.10(B) and 4.1(A)(13):** A judge or a judicial candidate shall not "in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial* performance of the adjudicative duties of judicial office." The term "impartial" is defined to mean "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge." Ind. Code of Judicial Conduct, "Terminology." This brief will refer to these canons, collectively, as the Commitments Canon.

- **Canons 4.1(A)(1) and (2)**: "[A] judge or judicial candidate[] shall not: *** (1) act as a leader in or hold an office in a political organization[]; (2) make speeches on behalf of a political organization." This brief will refer to these together as the Partisan Activities Canon.

- **Canons 4.1(A)(4) and (8)**: "[A] judge or judicial candidate[] shall not: *** (4) solicit funds for, pay an assessment to, or make a contribution to a political organization or a candidate for public office;*** (8) personally solicit or accept campaign contributions other than through a campaign committee authorized by Rule 4.4." This brief will refer to these rules together as the Direct Solicitation Canon.

The 2009 recodification of these canons brought them into line with the 2007 ABA Model Code of Judicial Conduct, but variations of them date back decades. *See, e.g.*, Ind. Code of Judicial Conduct, Canon 7(B)(1)(c) (1975); ABA Model Code of Judicial Conduct, Canons 5A(1)(a), 5A(1)(c), 5A(1)(e), 5C(2) (1990). In fact, as discussed in greater detail below, it was Indiana's prior version of the Commitments Canon that precipitated this lawsuit. In any event, these canons do not represent new or experimental rules for judges.

2. Indiana Right to Life ("IRTL"), a non-profit corporation whose purpose is "to support legislative and constitutional changes that protect the right to

life," began sending questionnaires to state-court judicial candidates in 2002, asking them to respond to a series of questions about legal rights to abortion, physician-assisted suicide, and related matters. *See* App. 38a-43a. A few judges provided substantive responses (*i.e.*, yes or no answers) to IRTL's questionnaire in 2002. *See Indiana Right to Life, Inc. v. Shepard*, 507 F.3d 545, 547 (7th Cir. 2007). None has ever been disciplined for doing so. App. 49a.

In June 2004, IRTL sent a nearly identical questionnaire to all judicial candidates in the state. *Indiana Right to Life, Inc.*, 507 F.3d at 547-48. Several contacted the Indiana Commission on Judicial Qualifications about whether the judicial canons permitted them to respond to the questionnaire. *Id.* at 548. IRTL received a few substantive responses to its 2004 questionnaire, but also received some responses indicating that the candidate was choosing not to provide substantive answers. *Id.*

When its 2004 questionnaire failed to yield many substantive responses, IRTL and two prospective voters filed a federal court lawsuit against the Commission challenging the prior Indiana Judicial Canons 5A(3)(d)(i) and (ii), which prohibited judges and judicial candidates from making (or appearing to make) pledges, promises and commitments, alleging that these canons caused the low response rate. *Id.* at 546. As part of its case, IRTL deposed eight of the judges to whom it sent questionnaires. It even noticed the deposition of Indiana's Chief Justice,

Randall Shepard, only to cancel the deposition less than five hours before it was scheduled to begin. The district court sanctioned IRTL for this conduct, ordering it to pay $2,455 in attorneys' fees.

That case ultimately foundered, however, because IRTL could not adduce testimony that any of the judges had refused to answer the IRTL questionnaire on account of the Indiana Canons. The Seventh Circuit dismissed the case for lack of standing because no judge or judicial candidate wanted to answer IRTL's questionnaire. *Indiana Right to Life, Inc.*, 507 F.3d at 549-50.

In 2008, IRTL again sent substantially similar questionnaires to judicial candidates. App. 3a. Among the recipients were judicial candidates Torrey Bauer and Judge David Certo. *Id.* Mr. Bauer was a candidate for the Republican nomination for Kosciusko County Superior Court judge, which nomination was to be decided in the May 2008 Republican Party Primary. App. 43a. He provided substantive answers to the IRTL questionnaire. *Id.*

Judge Certo, having been appointed to fill a vacancy on the Marion County Superior Court bench in 2007, was facing his first judicial election. App. 44a. Under the Marion County judicial election system, where the Republican and Democratic parties divide the available judgeships and submit slates of candidates for their allotted positions, *see* Ind. Code § 33-33-49-13, Judge Certo was functionally unopposed for both the May 2008 party

primary and the November 2008 general election. PI Tr. 28-31. Notwithstanding the certainty of his election, Judge Certo wished to provide substantive answers to the questionnaire but did not because he was worried that doing so might violate prior Indiana Judicial Canons 5A(3)(d)(i) and (ii), prohibiting pledges, promises and commitments. App. 44a.

3. On April 18, 2008, IRTL recruited candidate Bauer, who answered the 2008 questionnaire but subsequently became concerned that by doing so he might have violated prior Canons 5A(3)(d)(i) and (ii), and Judge Certo, who refrained from answering the 2008 questionnaire for the same reason, to join it in filing this action against the Commission. They sought declaratory and injunctive relief barring enforcement of the prior Canons 5A(3)(d)(i) and (ii), and the recusal requirement in prior Indiana Judicial Canon 3E(1) (which is no longer at issue). App. 31a.

Because Bauer's primary election was near, IRTL requested a preliminary injunction prohibiting the Commission from initiating enforcement proceedings if IRTL published Bauer's questionnaire responses. App. 32a. On May 6, 2008, the district court enjoined the Commission from initiating disciplinary proceedings under prior Canons 5A(3)(d)(i) and (ii) while it decided the merits. App. 32a.

Shortly thereafter, petitioners amended their complaint to add Judge Certo's facial and as-applied challenges to the Partisan Activities Canon (prior

Canons 5A(1)(a) and (c)) and the Direct Solicitation Canon (prior Canons 5A(1)(e) and 5C(2)), as well as the public endorsement restrictions of prior Canons 5A(1)(b) and 5C(1)(g) (which have never been pursued at any stage of the case). App. 32a. Judge Certo based his challenge to the Partisan Activities Canon on his desire to serve as a delegate to the Indiana State Republican Convention and to speak on behalf of the Republican Party at the Eastern Indiana Model Legislature, a youth conclave devoted to civics. App. 45a. He based his challenge to the Direct Solicitation Canon on his wish to solicit funds for his campaign from family members, former roommates and classmates. App. 44a.

Once the new Indiana Canons went into effect on January 1, 2009, petitioners filed a second amended complaint restating their facial and as-applied claims challenging the Commitments, Direct Solicitation and Partisan Activities Canons under the 2009 Indiana Judicial Code. App. 35a-36a. Petitioners, however, have also maintained their claims against the superseded canons on the theory that their prior conduct might be prosecuted under those prior canons. App. 36a.

Ultimately, following discovery and summary judgment cross-motions, the district court sided with the state on the merits, rejected all of petitioners' claims and vacated its preliminary injunction. App. 116a.

4. The Court of Appeals affirmed in all material respects in a unanimous opinion authored by Chief

Judge Easterbrook. App. 1a-28a. The court held that the speech prohibited by the Commitments Canon—"(promises 'inconsistent with the impartial performance of' judicial duties)"—is not constitutionally protected. App. 20a-22a. "*White I*," the Seventh Circuit observed, "did not hold that judges may make commitments or promises about behavior in office." App. 21a. Furthermore, "[n]othing in *White I* deals with statements of this flavor, or any other promise to act on the bench as a partisan of a political agenda." App. 21a. Upon this reasoning, the court rejected claims of overbreadth and vagueness and further held that the Due Process Clause permits an administrative body, such as the Commission, to issue advisory opinions and flesh out details about the canons' applicability to any given situation. App. 21a-26a.

The Court of Appeals turned aside Certo's challenge to the Partisan Activities Canon. App. 11a-17a. The political limitations for judges were valid for three principal reasons: "first, judges . . . must be seen as impartial if judicial decisions are to be accepted by the public, and participation in politics undermines the appearance of impartiality; second, judges are not entitled to lend the prestige of office (which after all belongs to the people, not to the temporary occupant) to some other goal; third, states have a compelling interest in 'preventing judges from becoming party bosses or power-brokers' . . . something that would undermine *actual* impartiality, as well as its appearance." App. 13a (citation omitted).

Indeed, the Seventh Circuit observed, the need to prevent misuse of judicial status goes well beyond regulating partisan campaigns. "The desire to prevent judges from using the prestige of office for other ends underlies a great deal of the Code of Judicial Conduct for United States Judges." App. 14a.

Finally, the court also rejected Judge Certo's challenge to the Direct Solicitation Canon based on his desire to solicit friends and relatives. It observed that there can be no distinction for the solicitation of donors the candidate knows, as the "potential for actual or perceived back scratching, or for retaliation against attorneys who decline to donate . . . is the same whether or not the judge knows the potential donor's first name." App. 10a. As for soliciting family members, "Judge Certo should follow Indiana's procedure for obtaining advice" from the Commission. *Id.*

REASONS TO DENY THE PETITION

Petitioners ask the Court to comb through and review fourteen First Amendment issues, as if to suggest (implausibly) that the Seventh Circuit broke new ground for every judicial canon on the books. They may hope to use this case to deregulate judicial election campaigns, but the decision below written by Chief Judge Easterbrook provides little reason for the Court to become involved. The Seventh Circuit, examining common, time-tested restrictions on judicial speech, reached the same unremarkable First Amendment conclusions as nearly all courts.

Fortunately, the plausible questions for review can be boiled down from fourteen to three, concerning the validity of the Commitments Canon, the Direct Solicitation Canon, and the Partisan Activities Canon. Petitioners also purport to challenge the party solicitation clause of Canon 4.1(A)(4), *see* Petition at 17, but the complaint never asserted such a claim, so that issue is waived.

Of the three plausible issues before the Court, only one—the Direct Solicitation Canon—arrives amidst inter-circuit tension. The others have not generated any conflict or other review-worthy hallmarks. Particularly given the spray of issues proposed by the Petition and the multiple layers of complexity petitioners associate with each, the Court, rather than take this case to review a shallow conflict on the Direct Solicitation Canon, should allow the issue to percolate in lower courts.

I. Abstract Tension Among Lower Courts Concerning the Proper Legal Standard Does Not Justify Review

As part of their broadside attack on judicial election campaign restraints, petitioners urge the Court to intercede expressly to determine the level of scrutiny applicable to *all* canons affecting "judicial campaign speech." Petition at 13. Any failure of lower courts to apply the same exact level of First Amendment scrutiny to all judicial canons, however, does not alone attest to the cert-worthiness of this case.

There is no need for the Court to take a case merely to resolve abstract tension in the legal standards applied by lower courts. *See* Eugene Gressman et al., Supreme Court Practice, 241 (9th ed. 2007) (the Court rarely grants *certiorari* when there is "merely an inconsistency in dicta or in the general principles utilized."). What matters is whether the lower courts ultimately agree concerning the validity of the same or similar laws from different states. *Id.* at 242 ("A genuine conflict, as opposed to a mere conflict in principle, arises when it may be said with confidence that two courts have decided the same legal issue in opposite ways, based on their holdings in different cases with very similar facts.").

If the lower courts' ultimate determinations of constitutionality are in conflict such that Supreme Court review is warranted, of course, the Court will address the proper legal standard in the process of reviewing the ultimate question of constitutional validity. But, if there is no ultimate conflict as to the constitutionality of a particular type of law, there is no point in taking a case just to review the legal standard lower courts have applied. In this regard, as demonstrated below, there are no ultimate issues of constitutionality that warrant review.

II. No Lower-Court Conflict, or Tension with *White I*, Justifies Review of the Commitments Canon

This case was originally only about whether Indiana can prohibit judges and judicial candidates from making pledges, promises or commitments. *See* Complaint, *Bauer v. Shepard*, 634 F.Supp.2d 912 (N.D. Ind. 2009) (No. 3:08-CV-196-TLS). Petitioners later amended the complaint and the case metamorphosed into a broadside attack on judicial campaign regulations more generally, but the main thrust of the case until now has always been petitioners' contention that the Commitments Canon is indistinguishable from the Announce Canon invalidated in *White I*. IRTL filed this case (as well as the earlier litigation dismissed on standing grounds, *see Indiana Right to Life, Inc.*, 507 F.3d at 549-50), because it wanted to clear the way for judges and judicial candidates to answer its questionnaires. As a consequence, both the district court and the Seventh Circuit treated the Commitments Canon as the main issue in the case. *See* App. 1a-28a, 92a-99a. Indeed, IRTL, the lead plaintiff, does not even have a stake in the other canons governing judicial campaigns that are at issue here.

The Petition, however, downplays the significance of the Commitments Canon issue—it barely even makes the top 10 questions presented. The reason for its subordination is obvious enough—there is no circuit conflict involving the Commitments Canon. IRTL says only that the ruling below "conflicts with

decisions of the Court and with *Carey* and *Buckley*. . . ." Petition at 20-23 (referring to *White I*; *Carey v. Wolnitzek*, 614 F.3d 189, 207-09 (6th Cir. 2010); and *Buckley v. Judicial Inquiry Board*, 997 F.2d 224, 228-29 (7th Cir. 1993)). But those asserted conflicts do not pan out.

First, alleging conflict with precedent from the same circuit—here *Buckley v. Judicial Inquiry Board*, 997 F.2d 224, 228-29 (7th Cir. 1993)—does not justify *certiorari*. If the decision below conflicts with *Buckley*, petitioners should have requested *en banc* review, not come to the Court demanding supervision. Regardless, there is no such intra-circuit conflict. Indiana's Commitments Canon is more narrowly targeted than the canon invalidated by *Buckley*, which prohibited judicial candidates from making "[p]ledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office." *Id.* at 225 (quoting Ill. S. Ct. R. 67(B)(1)(c)). That rule permitted far less speech than the current Indiana Commitments Canon, which allows *any* speech "consistent with the impartial administration of justice," *i.e.*, any speech consistent with judicial open-mindedness. Canon 4.1(A)(13); Code of Judicial Conduct, "Terminology."

Second, there is no conflict between the decision below and the Sixth Circuit's decision regarding Kentucky's judicial canons in *Carey*. Kentucky Judicial Canon 5(B)(1)(c) prohibits "intentionally or recklessly mak[ing] a statement that a reasonable person would perceive as committing a judge or

candidate to rule a certain way in a case, controversy, or issue that is likely to come before the court." The Sixth Circuit thought this provision ambiguous and remanded for the district court to determine its scope. *Carey*, 614 F.3d at 208. The Sixth Circuit has made no final judgment as to the constitutionality of the Kentucky Pledges Canon, so any inference that the Sixth Circuit would disagree with the decision below is premature and speculative.

Finally, this Court in *White I* pointedly did not declare, presuppose, or imply the invalidity of canons restricting pledges, promises or commitments by judges and judicial candidates. When the Court considered the constitutionality of the Minnesota Announce Canon, it said "the Minnesota Code contains a so-called 'pledges or promises' clause, which *separately* prohibits judicial candidates from making 'pledges or promises of conduct in office other than the faithful and impartial performance of the duties of office' . . . —a prohibition that is not challenged here and on which we express no view." *White I*, 536 U.S. at 770; *see also id.* at 780 ("But, as noted earlier, the Minnesota Supreme Court has adopted a separate prohibition on campaign 'pledges or promises' which is not challenged here.").

What is more, four Justices in *White I* expressed the view that the Minnesota pledges clause was permissible: "The constitutionality of the pledges or promises clause is thus amply supported; the provision not only advances due process of law for litigants in Minnesota courts, it also reinforces the

authority of the Minnesota judiciary by promoting public confidence in the State's judges." *Id.* at 819 (Ginsburg, J., joined by Stevens, J., Souter, J., and Breyer, J., dissenting).

Accordingly, it is no surprise that, shortly after the *White I* decision in 2002, state supreme courts upheld judicial canons similar to Indiana's Commitments Canon. In *In re Watson*, 794 N.E.2d 1, 5-8 (N.Y. 2003), the New York Court of Appeals ruled that the state's interest in using a similar canon to ensure due process is "overriding" because "[t]here is hardly . . . a higher governmental interest than a State's interest in the quality of its judiciary." *Watson*, 794 N.E.2d at 6 (internal quotations omitted). And in *In re Kinsey*, 842 So.2d 77, 85-89 (Fla. 2003), the Florida Supreme Court held that the analogous Florida canon "serves a compelling state interest in preserving the integrity of our judiciary and maintaining the public confidence in an impartial judiciary." *Kinsey*, 842 So.2d at 87.

The First Amendment question is whether the self-evident likelihood that campaign promises will yield judges with a particular kind of unrelenting closed-mindedness, and thereby defeat due process, is enough to tip the scales in favor of a targeted prophylactic restriction on judicial speech. *Some* rule against judicial-campaign promises concerning issues and cases likely to come before the court is "necessary" to protect due process. *See White I*, 536 U.S. at 776-77. The Indiana Commitments Canon is targeted, understood, and administered with sufficient precision and sensitivity to advance due

process without squelching all relevant campaign debate. If the canon were any narrower, it would be ineffective.

What is more, the decision below observed that petitioners incorrectly "treat as 'overbroad' any law forbidding any speech that is constitutionally protected." Pet. App. 20a. Even assuming the Commitments Clause might proscribe *some* protected speech (and the Seventh Circuit was hard-pressed to understand how it could), a law is facially invalid under the First Amendment only if its main applications are "substantially overbroad" in relation to protected speech. Pet. App. 21a-22a. Yet here petitioners "do not seriously contend that the commits clauses are overbroad in *that* sense." Pet. App. 22a. In fact, petitioners have never identified any other "announced views" they fear the Commitments Canon's "uncertain scope" may "proscribe." Petition at 27. As the court below put it, "[p]laintiffs want us to deem the law vague by identifying situations in which state officials *might* take an untenably broad reading of the commits clauses, and then predicting that they *will* do so." Pet. App. 24a.

The Court should not concern itself with petitioners' theoretical arguments in this regard. And, as there is no lower-court conflict over the validity of state judicial Commitments Canons, and no tension with *White I*, there is no reason for the Court to take up this issue.

III. There is No Circuit Conflict Justifying Review of the Partisan Activities Canon

Petitioners argue that the decision below upholding Indiana's Partisan Activities Canon conflicts with holdings of the Eighth Circuit in *Wersal v. Sexton*, 613 F.3d 821, 834 (8th Cir. 2010), *vacated on reh'g en banc* (8th Cir. Oct. 15, 2010), and *Republican Party of Minnesota v. White*, 416 F.3d 738, 754 (8th Cir. 2005) (*en banc*) ("*White II*"). This assertion is incorrect. Those cases addressed different, and far broader, restrictions on judicial candidate speech.

In the Partisan Activities Canon, Indiana merely precludes judges and judicial candidates from holding party leadership posts and, in the same vein, from speaking on behalf of political parties. *See* Ind. Code of Judicial Conduct, Canon 4.1(A)(1), (2). Indeed, insofar as Indiana's Partisan Activities Canon is matched by the federal judiciary's own speech restrictions, *see* Code of Judicial Conduct for United States Judges, Canon 5(A),[1] they are well within the mainstream of judicial regulation.

By contrast, in *White II*, the Eighth Circuit invalidated a canon that prohibited judges and judicial candidates from even identifying with a political party. *See White II*, 416 F.3d at 745. Indiana has no analogous canon—judges and judicial

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[1] Code of Judicial Conduct for United States Judges, Canon 5(A): "A judge should not: (1) act as a leader or hold any office in a political organization; (2) make speeches for a political organization or candidate."

candidates in Indiana may embrace party affiliations. What is more, the Seventh Circuit, in *Siefert v. Alexander*, 608 F.3d 974 (7th Cir. 2010), invalidated a Wisconsin canon prohibiting judicial candidates from affiliating with any party, but the Seventh Circuit saw no tension between that decision and its conclusion in this case that Indiana's Partisan Activities Canon is valid. Hence, the decision below does not conflict with *White II*.

Next, in *Wersal*, a panel of the Eighth Circuit invalidated a canon precluding judges and judicial candidates from endorsing or opposing candidates for other offices. *See Wersal*, 613 F.3d at 833-38. That decision, however, has been vacated pending *en banc* review, *see Wersal*, 613 F.3d 821, *vacated on reh'g en banc* (8th Cir. Oct. 15, 2010),[2] so it does not stand in conflict with any decisions of other courts, including the decision below. And while Indiana has a similar canon precluding candidate endorsements in other races, *see* Indiana Code of Judicial Conduct, Canon 4.1(A)(3), that canon has not been challenged in this litigation.

Moreover, Indiana's restrictions against partisan leadership by judges and judicial candidates fit comfortably within the Court's First Amendment doctrine. The Court has emphatically denied that judicial politics must be treated the same as legislative politics. *See White I*, 536 U.S. at 783 ("we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the

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[2] The *en banc* Eighth Circuit heard oral argument in *Wersal* on January 10, 2011.

same as those for legislative office"); *see also id.* at 805-06 (Ginsburg, J., dissenting) ("I would differentiate elections for political offices. . . . Legislative and executive officials serve in representative capacities. . . . Judges, however, are not political actors."). Restraining judges from party leadership and speaking roles, which are among the most partisan of election-related activities judicial candidates might undertake, is one way Indiana prevents judicial campaigns from resembling legislative campaigns.

More broadly, Indiana's Partisan Activities Canon is designed to: (1) prevent the use of judicial prestige in the service of private interests, *see* Indiana Code of Judicial Conduct, Canon 4.1, Comment 4; and (2) preserve the judiciary as credible, independent arbiters rather than party functionaries, *see* Indiana Code of Judicial Conduct, Canon 4.1, Comment 1. A judge who, as a convention delegate, throws political weight behind candidates and platforms, as Judge Certo would like to do, abuses judicial prestige and erodes judicial independence in a way that mere party affiliation (or even attendance at political meetings) could never do. Indiana's partisan-activity restrictions are therefore sufficiently narrow in scope to be valid, and there is no call for the Court to take this case to review them.

IV. Indiana's Ban on Direct Solicitation Validly Prevents Abuse of Judicial Office

Petitioners argue that the Direct Solicitation Canon, which prohibits Judge Certo from personally

soliciting campaign contributions, is unconstitutional, and that the Seventh Circuit's opinion otherwise conflicts with decisions from the Sixth, Eighth and Eleventh Circuits. *See* Petition at 14-15 (citing *Carey*, 614 F.3d at 204-07 (6th Cir. 2010); *Wersal*, 613 F.3d at 838-41 (8th Cir. 2010), *vacated on reh'g en banc* (8th Cir. Oct. 15, 2010); *White II*, 416 F.3d at 753-54 (8th Cir. 2005) (*en banc*); and *Weaver v. Bonner*, 309 F.3d 1312, 1319 (11th Cir. 2002), *reh'g & reh'g en banc denied*, 57 Fed.App'x 416 (11th Cir. 2003)). Only *Weaver*, however, presents actual ongoing tension with the decision below, so the Court should let this issue percolate awhile longer before addressing it.

Carey does not conflict with the decision below because it focused on an entirely different type of solicitation than is at issue here. As the Seventh Circuit observed, the court in *Carey* "did not question the propriety of limits on in-person solicitation, where the possibility of reward or retaliation is greatest, but concluded that Kentucky's rule is substantially overbroad because it covers solicitation by mass mailing." App. 10a-11a. Here, however, "Certo has not made anything of the fact that the definition of 'personally solicit' in Indiana's Code includes letters, so it is unnecessary to address the distinction drawn in *Carey* between in-person and written solicitations." *Id.* Thus, *Carey* and the opinion below peacefully coexist. In later cases the Seventh Circuit might, consistent with its decision here, reach the same holding as *Carey* with respect to mass mailing solicitations. Or, the Sixth Circuit might, consistent with *Carey*, reach the same

holding as the decision below with regard to in-person solicitations. With those options so plainly available, there is no need for the Court to intercede in light of *Carey*.

Next, the Eighth Circuit's decision in *Wersal* invalidating Minnesota's Direct Solicitation Canon does not justify review because, again, it has been vacated on rehearing. *See Wersal*, 613 F.3d 821, *vacated on reh'g en banc* (8th Cir. Oct. 15, 2010). The full Eighth Circuit might well agree with the Seventh Circuit that *Citizens United v. Federal Election Commission*, 130 S.Ct. 876, 899 (2010), *United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO*, 413 U.S. 548 (1973), and *Pickering v. Board of Education*, 391 U.S. 563 (1968), support such restrictions on judicial politicking. *See* App. 17a ("Although *Wersal* . . . recently held that Minnesota's equivalents of . . . Rule 4.1(A)(4) and (8) (the solicitation limits) violate the first amendment, it did not discuss (or even cite) *Pickering*, *Letter Carriers*, or any of the Supreme Court's other decisions concerning restrictions on public employees' political activities."). Accordingly, reviewing the issue in *this* case would be premature.

The Eighth Circuit's pending *en banc* review in *Wersal*, of course, equally negates any need to review this case in light of *White II*. Whatever tensions may exist between the decision below and *White II*, or any other Eighth Circuit cases, can be fully worked out in the *Wersal en banc* proceeding, where the full Eighth Circuit can reverse circuit precedent if need be. *See, e.g., United States v. Wright*, 22 F.3d 787,

788 (8th Cir. 1994) (observing that the court sitting *en banc* can overrule prior panel opinions).

Regardless, *White II* is not in conflict with the Seventh Circuit's decision in this case. Here, again, Certo focused his arguments on whether Indiana can restrict in-person solicitations, *see* App. 11a, while in *White II* the issue was whether the First Amendment entitles candidates to "solicit contributions from large groups" and, through campaign committees, "transmit solicitation messages above their personal signatures." *White II*, 416 F.3d at 764. The Eighth Circuit noted that the appellants in that case did not "challenge the campaign committee system that Canon 5 provides under which candidates may establish committees that may solicit funds on behalf of the candidate." *Id.* at 764-765. Indeed, the Eighth Circuit observed in *White II* that barriers to in-person solicitation were permissible because "[k]eeping candidates, who may be elected judges, from directly soliciting money from individuals who may come before them certainly addresses a compelling state interest as to parties to a particular case." *Id.* at 765. Consistent with that observation, the Seventh Circuit held in this case that prohibiting judges or judicial candidates from personally soliciting money from individuals who may come before them advances a compelling state interest in protecting due process from corruption or the appearance of corruption. *See generally*, App. 8a-10a.

Still, there is no disputing that the decision below stands in conflict with the Eleventh Circuit's

decision in *Weaver*. In that case, the court invalidated a prohibition against direct, in-person solicitation by judges and judicial candidates, the same sort of canon that is at issue here. *See Weaver*, 309 F.3d at 1322-23.

The Court, however, should not grant review based on this shallow, one-case conflict. The Seventh and Eleventh Circuits are the only circuits to have issued final judgments concerning prohibitions on personal, in-person solicitation *after* this Court's decision in *White I*.[3] Prior to *White I*, the Third Circuit upheld a solicitation restriction where the judicial candidate wanted to send mass-mailed solicitation letters. *See Stretton v. Disciplinary Board of the Supreme Court of Pennsylvania*, 944 F.2d 137 (3d Cir. 1991). But that court has never addressed an anti-solicitation rule in the context of in-person requests, and it has not had occasion to revisit its anti-solicitation holding as applied to mass mailings since *White I*.

Under these circumstances, the Court would benefit from continued percolation of this issue, and in particular from the full Eighth Circuit's consideration of this issue in *Wersal*. Because of the

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[3] In addition, since *White I*, only one state supreme court has addressed (in litigation) the validity of a canon prohibiting direct personal solicitation by judges and judicial candidates, and that court, perhaps unsurprisingly, upheld its own canon. *See In re Dunleavy*, 838 A.2d 338, 351 (Me. 2003). Another state supreme court did the same over a decade before *White I*, *In re Fadeley*, 802 P.2d 31, 41-43 (Or. 1990), but has yet to revisit the matter (in litigation) after *White I*.

attention that case is receiving from a complement of eleven Article III judges, it may generate multiple opinions shedding light on the issue from various perspectives. The Court will be in a much better, and more informed, position to address the direct solicitation issue once the *Wersal* decision is handed down.[4]

V. This Case Does Not Present Any Significant As-Applied Challenges

The Commission has never enforced the Commitments Canon, or its predecessor canons, against anyone for answering IRTL's questionnaire. As the Seventh Circuit observed, "[n]one of the nine questions calls for a 'commitment' or 'promise' on any issue." Pet. App. 18a. This lack of enforcement threat is significant, because, in an as-applied challenge, the state typically explains how the rationale for the statute supports enforcement under the particular circumstances. *See, e.g., Federal Election Comm'n v. Beaumont*, 539 U.S. 146, 147 (2003). But here, with no enforcement record and no demonstrated intent of the Commission to enforce the canons against those who answer the IRTL questionnaire, there is no enforcement rationale to

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[4] Continued percolation is particularly important since any decision the Court makes on this issue will have implications for the federal judiciary's own anti-solicitation canon: "A judge should not personally participate in fund-raising activities, solicit funds for any organization, or use or permit the use of the prestige of judicial office for that purpose." Code of Judicial Conduct for United States Judges, Canon 4(C).

weigh against the petitioners' asserted rights to answer the questionnaire.

The Petition also urges the Court to consider as-applied challenges to the Partisan Activities and Direct Solicitation Canons, but there is no reason to think the law would be improved or developed in any meaningful way by doing so. Judge Certo seeks an order permitting him to be a delegate to the Indiana Republican Convention and a Republican Party spokesman at the Eastern Indiana Model Legislature. He also wants to solicit political donations directly from his family and friends. Judge Certo, however, points to no courts that have considered similar applications and come out differently, nor identifies any established First Amendment doctrines that have been threatened by the Seventh Circuit's refusal to grant these particular carve-outs.

Judge Certo's legal theory in this regard is that the state's regulatory interests, even if sufficiently compelling in other circumstances, do not apply to what *he* wants to do. But the state's interest in preventing judges from abusing their prestige and becoming party functionaries applies directly to his proposed convention delegate and party spokesman roles. And whether the state's interest in preventing coercive misuse of judicial power applies when Judge Certo solicits his mother and uncles is hardly an issue of pressing national significance.

The Petition also argues that the Seventh Circuit's dictum directing Certo to the Commission

for an exemption to solicit his friends and relatives amounts to an unconstitutionally burdensome "prior restraint," citing *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007), *Citizens United v. FEC*, 130 S.Ct. 876 (2010), and *Buckley v. Valeo*, 424 U.S. 1 (1976). *See* Petition at 28-30. The Petition patently exaggerates the Seventh Circuit's observations in this regard.

In the campaign-finance cases cited in the Petition, the Court rejected the availability of bureaucratic interpretation as a way to save unconstitutionally vague, substantially overbroad statutes. *See Citizens United*, 130 S.Ct. at 889; *FEC*, 551 U.S. at 468-69; *Buckley*, 424 U.S. at 43. Here, however, the Seventh Circuit was not citing the Commission's advisory role to save statutes having similar flaws—the Direct Solicitation Canon is perfectly clear (as the Petition seems to concede), and even if the Partisan Activities and Commitments Canons are somehow vague, they do not forbid a substantial amount of protected speech such that their facial validity can be called into question. Pet. App. 22a-23a. That is why *Letter Carriers*, 413 U.S. at 580, and *Parker v. Levy*, 417 U.S. 733 (1974), which permit reliance on the administrative process to interpret vague statutes that do not threaten protected speech, and not the campaign-finance cases, apply here. *See* Pet. App. 24a-25a.

The decision below commented on the Commission's advisory role only when rejecting Certo's demand for exemptions from the facially

valid canons because (particularly owing to state-federal comity) the Commission, not a federal court, is the proper forum for seeking that relief. *See* Pet. App. 26a. And if the Commission were to refuse Certo's request to exempt some idiosyncratic activity that the First Amendment might protect, a pre-enforcement challenge (meaning a challenge to that application of the law *before* Certo risks violating the law) would still be available. The courts in that situation, unlike in this case, would even have the benefit of an actual, direct interpretation by the Commission.

At bottom, if Indiana may generally ban direct solicitations by judges and judicial candidates, there is no reason to review whether the Seventh Circuit was correct in guiding Judge Certo to the Commission for advice about soliciting his friends and relatives. As the Seventh Circuit put it, "[l]aws need not contain exceptions for every possible situation in which the reasons for their enactment are not present," Pet. App. 10a, and the availability of a process by which the Commission may create *exceptions* to the Direct Solicitation Canon perforce does not increase the (already allowable) burdens of the law. Hence, there is no plausible constitutional claim here, let alone any lower-court conflict that needs to be resolved.

VI. There is no Point Reviewing Superseded Canons

Petitioners continue to challenge prior judicial canons 5A(3)(d)(i) and (ii) (restricting pledges,

promises and commitments by judges and judicial candidates), which, by virtue of the canons adopted effective January 2009, are no longer in effect. The Seventh Circuit correctly held that "[b]ecause Canon 5A(3)(d) is no longer in force, neither Bauer nor anyone else can be 'chilled' by the risk of future punishment. . . . There is accordingly no need for prospective relief concerning pre-2009 rules." App. 7a-8a.

Petitioners have not established any likelihood that the superseded canons would be enforced against any of them, and they certainly have not demonstrated any circuit conflict as to whether superseded canons can ever present a live issue for judicial review. To the contrary, in *Kansas Judicial Review v. Stout*, 562 F.3d 1240 (10th Cir. 2009), the Tenth Circuit deemed moot a challenge to Kansas' superseded pledges and promises canons since there had never been an adjudication, or threats to enforce, under the old canons. *Id.*

Here, similarly, it is "inherently unlikely and thus not foreseeable" that the Commission will enforce the superseded canons against the petitioners. *Id.* at 1248. Thus, the claims challenging the validity of former Canons 5A(3)(d)(i) and (ii) are non-justiciable. As the Seventh Circuit observed, "[i]f the Commission ever hales Bauer (or anyone else) before the Supreme Court of Indiana on a charge of violating the former Canon 5A(3)(d), a defense based on the first amendment can be raised and adjudicated in the regular course." App. 8a.

CONCLUSION

The Court should deny the Petition, but in the alternative it should restate (as set forth herein) any questions as to which it grants *certiorari*.

Respectfully submitted,

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No. 10-425

In The
Supreme Court of the United States

TORREY BAUER, THE HONORABLE DAVID CERTO, AND INDIANA RIGHT TO LIFE, *Petitioners*,

v.

RANDALL T. SHEPARD, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

Reply Supporting Petition for a Writ of Certiorari

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Reply to Respondents' Brief in Opposition

I. This Case Presents A Genuine Constitutional Conflict That Leaves Petitioners Without Remedy.

Respondents contend that a writ of certiorari is not appropriate in this case because Petitioners present only theoretical arguments about the unconstitutional scope of the challenged judicial canons. Resp. at 15. This contention disregards that Petitioners themselves have been chilled from engaging in protected political speech. But more critically, it ignores that the effect of the Seventh Circuit's decision, unlike the Sixth, Eighth, and Eleventh Circuit judicial decisions, has been to confer broad, discretionary power to judicial conduct review boards to interpret overbroad, vague judicial canons, allowing pre-speech review of campaign speech on an ad hoc basis.

This is most clearly demonstrated in Petitioners' challenge to the commits clause. Respondents would have this Court believe that the clause only restricts pledges and promises of certain results in a particular case, a legitimate scope acknowledged by this Court in *Republican Party of Minnesota v. White,* 536 U.S. 765, 780 (2002) ("*White I*"), and by the Seventh Circuit in *Buckley v. Illinois Judicial Inquiry Bd.*, 977 F.2d 224, 228 (7th Cir. 1993), which this Court affirmatively cites, *White I,* 536 U.S. at 773. Even if the language of the commits clause could credibly be interpreted so narrowly, the facts of this case simply do not support such an interpretation.

The questions asked in INRTL's questionnaire are undisputably announcements of views as understood in

White I. Judicial candidates are asked questions like whether they "think *Roe v. Wade* was wrongly decided," whether "abortion should be permitted to save the life of the mother," and whether "there is no provision in [the] current Indiana Constitution which is intended to protect a right to abortion." App. at 125-26a. The Seventh Circuit in its decision below recognized that these questions only ask for general views on disputed social and legal issues. App. at 97a.

Yet from the very beginning, the Commission has asserted that answering the questionnaire would violate the commits clause. In 2004, the Commission was advising inquiring judicial candidates not to answer the questionnaire. (Babcock Dep., Doc. 19, attached as Ex. 16 at 41:21-23.) Once sued, the Commission's position became that answering the questionnaire *might* violate the commits clause. The Commission submitted discovery responses asserting it hadn't decided what the scope of the questions were, but that the questions may elicit answers that may commit or appear to commit the respondent or constitute an improper pledge or promise. App. at 131a-150a. And in 2008, when INRTL again sent out an identical questionnaire to judicial candidates, the Commission's response was to simply restate the commits clause to inquiring judicial candidates, advise them to review the Commission's Preliminary Advisory Opinion #1-02[1], and notify them of forthcoming revisions to the

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[1]This advisory opinion is vague and unhelpful to judicial candidates, asserting that the commits clause reaches "broad statements relating to the candidate's position on disputed social and legal issues," because they "incur[] the risk of violating the 'commitment' clause and/or

clauses that were to be adopted in 2009. (Comm. Resp., Doc. 19, attached as Ex. 3.)

The effect of this advice caused judicial candidates like Judge Certo to be chilled from answering the questionnaire because of the possibility of violating the commits clause. AC ¶ 32. And judicial candidates like Mr. Bauer became concerned about having answered the questionnaire because they had not consulted the Commission before answering. AC ¶ 28.

But even more crucially, the Commission's ever-evolving enforcement policy of the commits clause demonstrates two fundamental failings of the Seventh Circuit's willingness to give broad discretion to judicial disciplinary commissions.

First, if the Commission has its way and the Seventh Circuit's decision is left standing, First Amendment challenges to judicial speech canons could never be facial and would require judicial candidates during time-sensitive campaigns to submit requests for approval of their speech. Then, and only then, would candidates be able to bring a lawsuit seeking to engage in any denied, protected speech. *See* Resp. at 25. Even perfectly clear–though overbroad–rules like the solicitation clause and the party solicitation clause would require requests from judicial candidates to see if their speech might possibly be an exception to that rule. The procedural effect of the Seventh Circuit's ruling is to leave judicial candidates' speech at the mercy of state judicial conduct commissions. And the practical effect of that ruling on judicial candidates, who are busy running a campaign, is an unconstitutional chill,

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the 'promises' clause." (Advisory Opinion, Doc. 19, attached as Ex. 1 at 4.)

because they will likely avoid such untimely and unwieldy procedures and not engage in the desired political speech at all.

Second, the facts of this case demonstrate that the commissions themselves may not able to narrowly and constitutionally construe the meaning of vague canons and thereby offer meaningful guidance to judicial candidates in the form of a "yes" or a "no" on the canons' meaning. Canons so vague that their enforcers cannot articulate their scope even when asked in a particular and specific context reinforces that the canons should not be immune from facial review.

The only way to curb this broad, discretionary power–created in part through an improper standard of review and in part by unconstitutionally requiring judicial candidates to vet their speech with the Commission before uttering it–is for this Court to grant certiorari and establish a proper standard of review for judicial canons that affords judicial candidates an effective remedy for potential speech rights violations.

II.The Circuits' Conflict on the Standard of Review Is Likely Outcome Determinative.

Respondents contend that the circuits' disagreement on whether strict scrutiny applies is merely an "abstract tension in the legal standards applied by the lower courts" that is not cert-worthy. Resp. at 10. However, whether strict scrutiny applies is likely determinative of the outcome of not just this case, but of all challenges to judicial speech canons.

This was acknowledged in the en banc dissent to *Siefert v. Alexander*, 619 F.3d 776 (7th Cir. 2010).[2]

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[2]Respondents argue that en banc review, rather than

Writing for four judges, Judge Rovner observed that the Seventh Circuit's use of a different standard of review made the *Siefert* case an outlier among the federal circuits. *Id.* Moreover, she pointed out that the outcome of recent federal circuits' review under the strict scrutiny standard was to strike down the challenged canons under the First Amendment. *Id.* Every circuit court until the Seventh Circuit in *Siefert* and now *Bauer* has applied strict scrutiny, with the bulk of these decisions striking down the canons before them. *Id.* (*citing Wersal v. Sexton*, 613 F.3d 821 (8th Cir. 2010) (striking down a solicitation clause and an endorsement clause under strict scrutiny), *vacated by* 613 F.3d 821 (8th Cir. 2010 (granting en banc review); *Carey v. Wolnitzek*, 614 F.3d 189 (6th Cir. 2010) (striking down a personal solicitation clause and party affiliation clause under strict scrutiny); *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Cir. 2005) ("*White II*") (striking down a partisan activities clause and a solicitation clause under strict scrutiny); *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002) (striking down a solicitation clause and a false statement clause under strict scrutiny); *Stretton v. Disciplinary Bd.*, 944 F.2d 137 (3d 1991) (upholding the announce clause under strict scrutiny).

Because the standard of review has a very real and significant effect on the outcome of challenges to judicial campaign speech regulations, correcting it

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Supreme Court review, is the appropriate remedy for Petitioners. Resp. at 12. However, given the result in *Siefert*'s en banc review affirming a lesser standard of review, en banc review in this matter is not a meaningful remedy.

would reestablish uniformity among the federal courts and warrants Supreme Court review.

III. A Conflict Among The Circuits Remains.

Respondents assert that the facts of this case negate any circuit split on the substantive issues. Resp. at 24, 19. However, even if it were constitutional to restrict the speech Petitioners wish to engage in–which Petitioners do not concede–Petitioners still present valid overbreadth and vagueness challenges to these provisions. And unlike the Seventh Circuit, the Eighth, Eleventh and Sixth circuits have struck them and provisions substantially similar to them down as unconstitutional.

Respondents acknowledge that the decision below is in conflict with *Weaver*. Resp. at 21. But it characterizes this conflict as "shallow" because the *Wersal* case, now on en banc review in the Eighth Circuit would remedy whatever conflicts exist among the circuits through its forthcoming decision by overruling *White II*. Resp. at 20. But even if the Eighth Circuit agrees with Seventh Circuit as to the standard of review and constitutionality of the clauses before it, there will now be two circuits that are in conflict with the Eleventh Circuit. If the Eighth Circuit is in accord with its prior *White II* decision and the Eleventh Circuit decision, it will remain in conflict with Seventh Circuit. Respondents' "solution" posits no remedy at all to the circuit split on the issues in this case.

Moreover, the Sixth Circuit conflict remains. Respondents contend that because the Sixth Circuit's *Carey* decision did not conclude that Kentucky's

commits clause was unconstitutional, it is not in conflict with the Seventh Circuit's ruling in this case. Resp. at 13. Likewise, they argue that the personal solicitation clause was struck because of the nature of the solicitation at issue. Resp. at 19. But *Carey*, applying strict scrutiny, struck the personal solicitation clause facially. *Carey,* 614 F.3d at 207 ("The solicitation clause is overbroad and thus invalid on its face.") And the *Carey* court acknowledged a fundamental constitutional failing in the commits clause and, lacking a record on the matter, chose to afford the Commonwealth an opportunity to narrow the meaning of the clause to save it from facial unconstitutionality.[3] *Id.* at 208-9 ("The clause contains a serious level-of-generality problem. ... At this point it is not clear what the Commonwealth's position on the term ["issues"] is.") The Sixth Circuit's approach is in no way analogous to the Seventh Circuit's decision giving Respondents–which have had ample opportunity to interpret the challenged clauses–broad discretion in enforcing their canons and dismissing any facial challenge on those grounds. And the *Carey* decision remains in conflict on the larger issue of whether strict scrutiny applies to judicial campaign speech regulations.

A circuit split remains among the circuits as to the

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[3] In response to the *Carey* ruling, the Kentucky Supreme Court issued an emergency order immediately adopting new commits clause identical to the one at issue in this case, perhaps in an effort to give the clause some legitimacy using the decision below. *In re: Emergency Order Amending Rules of the Supreme Court,* No. 2010-11 (Dec. 15, 2010), *available at* http://courts.ky.gov/NR/rdonlyres/53634E0C-A5E5-4DC0-BE81-43ABE1E05695/0/201011.pdf.

constitutionality of the commits clause, the personal solicitation clause, the party solicitation clause, the party leadership clause, and the party advocacy clause. Petitioner's writ should be granted.

Conclusion

For the foregoing reasons, this Court should issue the requested writ of certiorari and decide this matter on the merits.

Respectfully submitted,

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